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In the Supreme Court of the United States

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No. 768.

FOSTER FOUNTAIN PACKING COMPANY, INC., AND SEA FOOD COMPANY, *Appellants,*

vs.

E. J. HAYDEL, FRED SCHOUEST, L. R. CABRIAC ET AL.

No. 769.

L. O. JOHNSON, JR., and SEA FOOD COMPANY, TANAS HEBERT ET AL., *Appellants,*

vs.

E. J. HAYDEL, FRED SCHOUEST, L. R. CABRIAC ET AL.

STATEMENT AND BRIEF FOR APPELLANTS

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or towns of that state game fit for food, that has been lawfully killed and is lawfully in the possession of the keeper of such market, he may without becoming a criminal buy such game and take it into his possession, provided his intention be to eat it or to have it eaten in Connecticut. But he will subject himself to a fine, as well as to imprisonment upon his failing to pay such fine, if he buys and takes possession of such lawfully killed game with intent to send it to a friend in an adjoining state.

"The court cites *McCready v. Virginia*, 94 U. S. 395 (24: 248), in which it was held that Virginia could restrict to its citizens the privilege of *planting* oysters in the streams of that state, the soil under which was owned by it. But I cannot believe that it would hold that oysters which had been lawfully taken out of such streams and which had been lawfully planted, could not be purchased in Virginia with the intent to ship them to another state. This court in *Plumley v. Massachusetts*, 155 U. S. 461 (39: 223), another of the cases cited by the majority, sustained as valid a statute of Massachusetts, enacted to prevent deception in the manufacture and sale in that state of imitation butter, and which prohibited the sale of oleomargarine, artificially colored so as to cause it to look like genuine yellow butter. But I cannot suppose that this court will ever hold that a state could make it a crime to purchase with the intent to send it to another state oleomargarine or genuine yellow butter that had been lawfully manufactured within its limits."

As above stated, we are making no attack upon the main opinion in the case. We submit, however, that the doctrine announced should not be extended.

The frontier of valid state legislation in the legitimate exercise of its police power for the purpose of conserving its natural resources is marked in that opinion, and we do urge upon the court that the principles be not further extended. In order to sustain the legislative enactments under review in this case, it will be necessary for the court to extend beyond any limit which has heretofore been reached the right of the state in the exercise of its alleged police power, through the conservation of its natural resources, to regulate the transportation of such commodities in interstate commerce.

Suppose that in the Geer case, supra, the act had provided that the birds should be picked of their feathers and dressed in Connecticut, and after such action was taken, then every particle of the bird could be shipped in interstate commerce without limitation or restriction. If the Geer case had contained any such provisions, the same would have been identical in principle with this case. The statutes under review do not require that either the shrimp or the oysters or any part thereof be kept within the limits of the state as a food or other useful product for the benefit of the people of the state.

Section 13 of the "Shrimp Act" contains the following language:

> ". . . the same, shall have a qualified interest or property in the shrimp so taken or acquired in the shells, which qualified interest may be sold or transferred to any other person, firm or corporation within the limits of the State; and after the edible portions of the abdomen popularly called tail meat of said shrimp shall have been removed from the shell, within the State of Louisiana, such lawful taker or possessor, his heirs or assigns, as the case may be, shall be vested with all of the rights and property of the state in and to said

shrimp tail meat and shall have the right to sell such shrimp tail meat or ship the same beyond the limit of the state, without restriction or reservation."

Here is an expressed legislative declaration that the meat of the shrimp are not intended to be conserved as a food for the benefit of the people of the State of Louisiana. Upon the other hand, the act expressly provides that whenever the heads and the hulls are taken off that the meat, that is to say, everything except the heads and the hulls, may be shipped in interstate commerce *without restriction or reservation.* In other words, may be shipped in unlimited quantities without reservation of any benefit thereof as a food for the people of the State of Louisiana.

When we turn now to the remaining portion of the section, the act makes it unlawful to ship raw shells or hulls from the state, the section containing a declaration that they are required to be manufactured into fertilizer or used for an element in chicken feed. We call your honors' attention to the fact that after this is done no portion thereof is conserved for the use and benefit of the people of the state. Upon the other hand, the act expressly permits every particle thereof to pass into interstate commerce. The remaining portion of the act is as follows:

"When the shrimp hulls or shells and heads shall have been conserved for the purposes herein stated, the right of property therein theretofore existing in the State shall pass to the lawful taker or the possessor thereof. Any person, firm or corporation violating the provisions of this section shall be liable to the penalties hereinafter imposed." Sections 2 and 3 of the "Oyster Act" are similar in language and identical in legislative purpose.

While the act ostensibly requires the hulls of shrimp and the shells of oysters to be used as stated in the act, no punishment is attached for a failure so to do, and the proof is that as to the shrimp, the almost universal custom exists of casting the same into the bayous and lakes, and that such negligible portion of the heads and hulls of the shrimp as is manufactured into shrimp bran by a drying process is immediately shipped out of the state in interstate commerce; and the same facts apply to the oyster shells. Under the act it is a matter of indifference to the State of Louisiana whether the hulls and shells are in fact used by the people of Louisiana within the state or not. As to the oysters, the proof shows that many of them are thrown out and wasted, large quantities shipped to Texas in the rough state for the building of roads, and where any part of the oyster shells are manufactured into chicken feed, the product is shipped out of the state. It is perfectly apparent, therefore, that the acts were not passed for the purpose of conserving to the people of Louisiana its natural resources. The statutes do not rest upon the principle announced in the Geer case, supra.

In the Geer case the people of Connecticut announced that the birds were needed in the state as a food for its people. In the present case the Legislature of Louisiana announces by the necessary effect of what is permitted by the act, that it does not need any part of the shrimp or oysters in the state, but that every particle thereof may go out, provided the manufacturing plants are moved from Mississippi to Louisiana territory.

The territory involved in this suit was acquired by the United States from France and was conveyed to the sovereign state of Louisiana by the Act of Congress dated February 20, 1811, creating Louisiana as a state. The argument which we contend for is especially

applicable since in granting this territory to the state of Louisiana the grant was made subject to the Constitution of the United States, which is the supreme fundamental law of the land.

In the case of *U. S. of America v. Holt State Bank*, 270 U. S. 49, 70 L. ed. 465, the following rule is announced in respect to the title of the states in navigable waters.

> "It is settled law in this country that lands underlying navigable waters within a state belong to the state in its sovereign capacity and may be used and disposed of as it may elect, subject to the paramount power of Congress to control such waters for the purposes of navigation in commerce among the states and with foreign nations, and subject to the qualification that where the United States, after acquiring the territory and before the creation of the state, has granted rights in such lands by way of performing international obligations, or effecting the use or improvement of the lands for the purposes of commerce among the states and with foreign nations, or carrying out other public purposes appropriate to the objects for which the territory was held, such rights are not cut off by the subsequent creation of the state, but remain unimpaired, and the rights which otherwise would pass to the state in virtue of its admission into the Union are restricted or qualified accordingly. *Barney v. Keokuk*, 94 U. S. 324, 338, 24 L. Ed. 224, 228; *Shriveley v. Bowlby*, 152 U. S. 1, 47, 48, 57, 58, 38 L. Ed. 331, 348, 349, 352, 14 Sup Ct. Rep 548; *Scott v. Lattig*, 227 U. S. 229, 242, 57 L. Ed. 490, 496, 44 L. R. A. (N.S.) 107, 33 Sup. Ct. Rep. 242; *Seattle v. Oregon & W. R. Co.* 255 U. S. 56, 63, 65 L. Ed. 500, 506, 41 Sup. Ct. Rep. 237; *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U. S. 77, 83-85, 67 L. Ed. 140, 144, 43 Sup. Ct. Rep. 60."

The identical question was decided adversely to the defendants in error by the Supreme Court of Louisiana in the case of *State v. Ferrandau*, 58 So. 870. Section 1, Act No. 189, Louisiana Legislature of 1910 contained the following provision:

> "That all beds and bottoms of rivers, bayous, lagoons, lakes, bays, sounds and inlets, bordering on, or connecting with, the Gulf of Mexico, and that part of the Gulf of Mexico within the jurisdiction of the state of Louisiana, including all natural oyster reefs and oysters and other shell fish growing thereon shall be construed and remain the property of the State of Louisiana, except as otherwise provided, and shall be under the exclusive control of the board of commissioners for the protection of birds, game and fish. The board may permit the use of said bottoms and reefs for the purpose of fishing, taking, bedding and raising oysters and other shell fish, subject to the restrictions imposed by law and the regulations of said board in so far as they do not conflict with the laws of the state. No grant, sale or conveyance of the lands forming the bottoms of said bodies or streams of water shall, hereafter, be made by the Register of the State Land Office, by any other official, or by any subordinate political corporation. Persons, firms, or corporations domiciled in this state, with their factories, shucking plants and shipping depots, located therein, may enjoy the right of fishing oysters from the natural reefs and leased bedding grounds whenever they have complied with the rules and regulations of said board; provided such oysters be canned and shucked or packed in this state, or shipped raw, in shells, from a shipping depot in this state, but no person, firm or corporation shall ship oysters out of this state for canning or packing out of this state."

The Supreme Court of Louisiana, speaking through Mr. Justice Monroe, held that the act was not one in the exercise of the legitimate police power of the state, but held that the act was a regulation of interstate commerce and void, using the following language:

> "It will thus be seen that the law contemplates that the oyster shall be a commodity of commerce, and specifically provides that they may be packed and canned, and shipped in that condition or raw, in the shells, from a shipping port in this state, and that they may be, and as the admitted facts in this case show, are, lawfully sold and bought, in the open market, by any one who may choose to engage in the traffic, and hence may be bought by citizens of other states. The contention, however, seems to be that it is competent for the State of Louisiana to attach to the shipments, thus specifically authorized, the condition that they shall not be made with a view to the canning or packing of the oysters 'out of this state.'
>
> "In other words, a citizen of Louisiana who buys, in open market in this state, oysters 'grown in private beds' or elsewhere, which are lawfully sold, may take them to his home and there sell, consume, pack or can, and (either before or after they are packed or canned) ship them to another state; but the citizen of another state, who also buys such oysters in the open market, is prohibited from taking, or shipping them to his home, if his intention is there to pack or can them. So that the state, having made the oyster a commodity of interstate commerce, assumes to regulate and control such commerce, as those who engage in it may be actuated by one purpose or another; saying to the one shipper, 'As your purpose is that your buyers and consignees, living out of the state, shall sell or consume the oysters which you sell and ship to them, your trade is

lawful;' and to the other, 'As your purpose is that your buyers and consignees, or that you, yourself, shall pack or can, out of the state, the oysters shipped by you, your trade is unlawful;' and saying to all, 'The oysters produced in Louisiana, whether in private beds or elsewhere, may be packed and canned, but whilst such packing and canning is lawful if done within the state, their shipment, for the purpose of packing or canning them, out of the state, is unlawful.'

"Conceding (arguendo) that the state may prohibit, altogether, the shipment of oysters beyond her borders, whether 'grown in private beds' or elsewhere, she has not done so. To the contrary, any one may ship all that he chooses, provided only, that those which have not already been so dealt with shall not be shipped for packing and canning, out of the state, may ship all that they choose in that form and for any purpose. It is not a question, therefore, of the number or quantity that may be shipped, but a question of forcing all those who are engaged in the oyster trade to pack and can, or to have packed and canned, all the oysters produced in Louisiana, which they propose to sell in that form, packed and canned in Louisiana packeries and canneries, in order, as our learned brother says, 'to increase the valuable assets of the state * * * and thus add to the revenues of the state.'

"There can be no question, as it appears to us, that this is to impose a regulation upon interstate commerce, (those who buy, and sell and ship being engaged in that business, as well as the carriers, who merely transport their goods), for it is to lay an embargo upon the trader who may wish to ship a limited number of oysters, to be packed and canned elsewhere, whilst permitting another to ship an unlimited number, which have

been packed or canned within the state, for any other purpose whatever. The only remaining question is whether such regulation is permissible, as incidental to the object which it is designed to accomplish. And that question, we think, must be answered in the negative.

"The states, for the enforcement of their quarantine and inspection laws, the right to enforce which is reserved to them by the Constitution, may impose conditions which operate as regulations of interstate and foreign commerce; and so, in the legitimate exercise of their police power, which is a term of wide significance, but we know of no instance in which it has been held that a state may regulate such commerce merely that its revenue may be increased.

"The right of a state to prohibit the possession, during a closed season, within its borders, of game birds, taken in other jurisdictions, was a question upon which the courts differed, until it was finally settled by an act of Congress authorizing the exercise of such power. *People ex rel. Hill v. Hesterberg*, 184 N. Y. 126, 76 N. E. 1032, 3 L. R. A. (N.S.) 163, 128 Am. St. Rep. 528, 6 Ann. Cas. 353. The right of a state to prohibit, during the open season, the exportation of such birds, killed within its borders, was decided in the affirmative in *Geer v. State of Conn.*, 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793, and it was there held that: 'Although the killing of game and its sale within the state are allowed, it does not thereby necessarily become the subject of interstate commerce in the legal meaning of those words.'

"The prohibition was, however, general, and the court, additionally, held that: 'The police power of the state to preserve game birds, as a

valuable food supply for its people, justifies a statute prohibiting the transportation of such birds beyond the state, even if interstate commerce may be remotely affected.'

"Here, the apparent purpose is not to preserve a valuable food supply, but to secure to those so engaged, in this state, a monopoly of the business of packing and canning Louisiana oysters, and thereby increasing the assessable property and revenues of the state.

"In *McReady v. Virginia*, 94 U. S. 291, 24 L. Ed. 248, Waits, C. J., said: 'The precise question to be determined in this case is whether the State of Virginia can prohibit the citizens of other states from planting oysters in Ware River, a stream in that state where the tide ebbs and flows, when its own citizens have that privilege. * * * There is here no question of transportation or exchange of commodities, but only of cultivation and production.'

"In *Turner v. State of Maryland*, 107 U. S. 38, 2 Sup. Ct. Rep. 44, 27 L. Ed. 370, a statute of the state of Maryland, providing for the packing and inspection, or marketing without inspection, of tobacco grown in that state, was held not to be in contravention to the commerce clause of the Constitution of the United States; but the statute was general in its application and did not undertake to regulate shipments of tobacco with regard to the purpose of the shipper or consignee.

"On the other hand, in *Robbins v. Taxing District*, 120 U. S. 489, 7 Sup. Ct. Rep. 592, 30 L. Ed. 694, it was held that (quoting from the syllabus): 'The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce.'

"The negotiation, therefore, in Mississippi, of the sale of oysters, which are in Louisiana, (and being lawfully sold there in open market, for the purpose of introducing them into Mississippi, is interstate commerce, and a condition, imposed by the law of Louisiana, that one buyer in Mississippi shall have his oysters shipped to him provided he intends to make this use of them, and another buyer may have his shipped, provided he intends to make that use, is a regulation of that commerce, within the law, as we understand it, vesting such power of regulation in Congress; nor do we think that, as applied to this case, it affects the discriminating character of the regulation, that the oysters were bought in New Orleans, by defendant, and shipped by him to the canning company, in Biloxi, for which he purchased, or to which he sold, them.

"In *Brimmer v. Rebman*, 138 U. S. 78, 11 Sup. Ct. 213, 34 L. Ed. 862, it was held that: 'A state can not, under the guise of exerting its police powers, or of enacting inspection laws, make discriminations against the products and industries of its own or of other states.

"Nor can a state, with reference to persons engaged in interstate commerce, make discriminations in favor of those who patronize its industries and those who patronize the industries of other states.

"We are therefore of the opinion that the demurrer should have been sustained, and it is, accordingly, ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed; that the demurrer filed by the defendant be sustained; and that he be discharged without delay."

This case was expressly referred to with approval by this Court in the case of *Lacoste v. Department of Conservation*, 263 U. S. 545, 68 L. Ed. 437. In that case a severance tax was imposed by the State of Louisiana upon the skins of all wild game taken within the state. A dealer in such skins, who bought the same within the state with the intention thereafter to sell the same in interstate commerce, contested the act upon the ground that the tax was one imposed upon interstate commerce. This Court found, however, that the tax imposed was not one for revenue, but for the purpose of bearing the expenses of the conservation department, in the exercise of its legitimate police power, and further found that there was no transportation in interstate commerce; that while the dealer may have intended at some time to ship the commodity in interstate commerce, that there was no moving in interstate commerce in any sense at the time. The court used the following language:

> "Whether the tax here involved might be upheld by virtue of the power of the state to prohibit, and therefore to condition, the removal of wild game from the state, we do not now consider, but dispose of the case upon other grounds. The commerce clause (Art. 1, Sec. 8, Clause 3), confers on Congress power to regulate interstate and foreign commerce, and therefore such power is impliedly forbidden to the states. 'Even their power to lay and collect taxes, comprehensive and necessary as that power is, can not be exerted in a way which involves a discrimination against such commerce.' *Pennsylvania v. West Virginia*, 262 U. S. 553, 596, 67 L. Ed. 1117, 1132, 32 A. L. R. 300, 43 Sup. Ct. Rep. 658, and cases cited; *Kansas City., Ft. S. & M. R. Co. v. Botkin*, 240 U. S. 227, 231, 60 L. Ed. 617, 818, 36 Sup. Ct. Rep. 261; *Brimmer v. Rebman*, 138 U. S. 78, 82, 34 L. Ed. 862, 863, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213; *Elmer v. Wallace*, 275 Fed. 86, 90;

> *State v. Ferrandau*, 130 La. 1035, 1041, 58 So. 870, Ann. Cas. 1913 D, 1170. *A state may not enforce any law, the necessary effect of which is to prevent, obstruct or burden interstate commerce. Pennsylvania v. West Virginia*, supra, 596, 597, and cases cited."

The fact that the State of Louisiana in the *Ferrandau* case, supra, has expressly adjudicated that such an act, having for its purpose that of compelling manufacturers of oysters to establish factories within the state, is not a legitimate exercise of the police power of the state, we respectfully submit is binding upon this court; that is to say, what is a proper exercise of police power on the part of the state is a judicial question, and it is within the province of the highest court of a state to mark for the state the limit of its exercise. Of course, the decision of the state court would not be binding on this Court, but it is binding upon the state court.

In *Corpus Juris*, Volume 15, page 927, the following rule is announced:

> "Where a question as to the construction or effect of the constitution or statutes of a state arises in the courts of another state or of the United States, such courts should follow the decisions of the court of last resort of the state whose constitution or statutory provisions are involved, even though they would be inclined to place a different or even an opposite construction upon a similar provision if it appeared in the constitution or statutes of their own state."

It is well established that this court is bound by the construction of the Supreme Court of a state on its own statutes. *Stebbins v. Riley*, 268 U. S. 137, 69 L. ed. 884; *Central Union Telephone Co., v. Edwardsville*, 269, U. S. 190 70 L. ed. 229; *Chas. Wolf Packing Co. v. Court of Industrial Relations*, 267 U. S. 555, 69 L. Ed. 758; *North Land Company v. Hoffman*, 268, U. S. 276, 69 L. Ed. 953.

In other words, the Supreme Court of the State of Louisiana, in its latest utterance upon this subject, has denounced such legislation as not being a legitimate exercise of the police power of the state and as being in contravention of interstate commerce. Of course, the decision of the Supreme Court of Louisiana is not binding upon your honors as to whether or not the act interfered with interstate commerce, though the same may be highly persuasive. However, as marking the limit of the state's police power, the decision is conclusive.

It is well settled by repeated decision of this Court that a state can pass no law, whatever may be its purpose, which places a direct burden upon interstate commerce. In the case of *Hall v. Josephine De Cuir*, 95 U. S. 485, 24 L. Ed. 547, a statute of the State of Louisiana provided that a steamboat carrying passengers should carry all persons applying for passage, without discrimination as to color. The act gave the carrier, however, the right to reject immoral or offensive passengers. The plaintiff, a colored woman, applied for passage and demanded that she be admitted to the first class cabin. She was excluded therefrom and brought suit for damages under that statute. The vessel was engaged in interstate commerce, and this Court held that the Louisiana statute was void as a regulation thereof, using the following language:

> "But we think it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instrument to be employed after coming within the State, but directly upon the business as it comes into the State from without or goes out from within. While it purports only to control the carrier when engaged within the State, it must necessarily influence his

conduct to some extent in the management of his business throughout his entire voyage. His disposition of passengers taken up and put down within the State, or taken up within to be carried without, cannot but affect, in a greater or less degree, those taken up without and brought within, and sometimes those taken up and put down without. A passenger in the cabin set apart for the use of whites without the State must, when the boat comes within, share the accommodations of that cabin with such colored persons as may come on board afterwards, if the law is enforced.

"It was to meet just such a case that the commercial clause in the Constitution was adopted. The River Mississippi passes through or along the borders of ten different states, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each state was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each State could provide for its own passengers and regulate the transportation of its own freight, regardless of the interests of others. Nay more, it could prescribe rules by which the carrier must be governed within the State in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if, on one side of a state line, his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be gov-

erned from one end to the other of his route is a necessity in his business, and to secure it Congress, which is untrammeled by state lines, has been invested with the exclusive legislative power of determining what such regulations shall be. If this statute can be enforced against those engaged in interstate commerce, it may be as well against those engaged in foreign; and the master of a ship clearing from New Orleans for Liverpool, having passengers on board would be compelled to carry all, white and colored, in the same cabin during his passage down the river, or be subject to an action for damages 'exemplary as well as actual,' by one who felt himself aggrieved because he had been excluded on account of his color."

In the case of *Weber v. Virginia,* 103 U. S. 344, 26 L. Ed. 563, it presented for review a statute which placed a privilege tax of one amount upon a merchant selling as commission agent sewing machines manufactured within the state, and an entirely different license for the sale under similar circumstances of sewing machines manufactured without the state. This Court held that a direct burden was created upon interstate commerce, that the statute was void, using the following language:

"By these sections, read together, we have this result: the agent for the sale of articles manufactured in other states must first obtain a license to sell, for which he is required to pay a specific tax for each county in which he sells or offers to sell them; while the agent for the sale of articles manufactured in the State, if acting for the manufacturer, is not required to obtain a license or pay any license tax. Here there is a clear discrimination in favor of home manufacturers, and against the manufacturers of other state. Sales by manufacturers are chiefly effected through agents. A tax upon their agents when thus engaged is, therefore, a tax upon

them, and if this is made to depend upon the foreign character of the articles, that is, upon their having been manufactured without the state, it is to that extent a regulation of commerce in the articles between the States. It matters not whether the tax be laid directly upon the articles sold or in the form of licenses for their sale. If by reason of their foreign character the State can impose a tax upon them, or upon the person through whom the sales are effected, the amount of the tax will be a matter resting in her discretion. She may place the tax at so high a figure as to exclude the introduction of the foreign article, and prevent competition with the home product. It was against legislation of this discriminating kind that the framers of the Constitution intended to guard, when they vested in Congress the power to regulate commerce among the several states.

"In *Welton v. Missouri*, 91 U. S. 275 (XXIII., 347) we expressed at length our views on the subject, and to our opinion we may refer for their statement. No one questions the general power of the State to require licenses for the various pursuits and occupations conducted within her limits, and to fix their amount as she may choose, and no one on this bench—certainly not the writer of this opinion—would wish to limit or qualify it in any respect, except when its exercise may impinge upon the just authority of the Federal Government under the Constitution, or the limitations prescribed by that instrument. But where a power is vested exclusively in that government, and its exercise is essential to the perfect freedom of commercial intercourse between the several states, any interfering action by them must give way. This was stipulated in the indissoluble covenant by which we became one people."

In the case of *Lake Shore Railroad Co. v. State of Ohio*, 173 U. S. 285, 43 L. Ed. 702, there was under review a statute of the State of Ohio which required an interstate railroad company to stop three of its trains daily at each and every city or village within the state containing more than 3,000 inhabitants. This Court held the act unconstitutional as a direct burden upon interstate commerce.

The question was presented in the case of *State of Missouri v. Kansas Natural Gas Co.*, 265 U. S. 298, 68 L. ed. 1027. In that case the gas company was engaged in transporting through pipelines gas from Oklahoma and Kansas into Missouri. The Public Utilities Commission of the State of Missouri undertook to fix the cost of the transportation. The gas company increased the price fixed by the Commission from 35 cents to 40 cents per thousand cubic feet. The question presented in the case was as to the power of the State of Missouri, acting through its Utilities Commission, to fix the rate. This Court held that there was a direct burden upon interstate commerce, using the following language:

> "The business of the Supply Company, with an exception not important here, is wholly interstate. The sales and deliveries are in large quantities, not for consumption, but for resale to customers. There is no relation of agency between the Supply Company and the distributing companies, or other relation except that of seller and buyer. (*Public Utilities Commission v. Landon*, 249, U. S. 236, 244, 245, 63 L. Ed. 577, 585, 586, P. U. R. 1919C, 834, 39 Sup. Ct. Rep. 268), and the interest of the former in the commodity ends with its delivery to the latter, to which title and control thereupon pass absolutely. The question is, therefore, presented in its simplest form; and if the claim of state power be upheld, it is difficult to see how it could be denied in any case of interstate transportation and sale of gas. Both Federal Courts denied the power. The state court

conceded that the business was interstate and subject to Federal control, but rested its decision the other way upon the fact that Congress had not acted in the matter, and that, in the absence of such action, it was within the regulating power of the state. The question is controlled by familiar principles. Transportation of gas from one state to another is interstate commerce; and the sale and delivery of it to the local distributing companies is a part of such commerce. In *Public Utilities Commission v. Landon,* supra, at p. 245, this court said: 'That the transportation of gas through pipe lines from one state to another is interstate commerce may not be doubted. Also, it is clear that, as part of such commerce, the receivers might sell and deliver gas so transported to local distributing companies free from unreasonable interference by the state.' See *Pennsylvania v. West Virginia,* 262 U. S. 553, 596, 67 L. Ed. 1117, 1132, 32 A. L. R. 300, 43 Sup. Ct. Rep. 658, and cases there cited."

The case of *Ozark Pipe Line Co. v. Monier,* 266 U. S. 555, 69 L. Ed. 439, presented a case where the State of Missouri attempted to levy a tax in support of its state government on oil passing through the state in pipes to another state. This court held that the tax could not be sustained, using the following language:

"The tax is one upon the privilege or right to do business (*State ex rel. Marquette Hotel Invest. Co. v. State Tax Commission,* 282 Mo. 213, 234, 221 S. W. 721); and if appellant is engaged only in interstate commerce, it is conceded, as it must be, that the tax, as far as appellant is concerned, constitutionally cannot be imposed. It long has been settled that a state cannot lay a tax on interstate commerce in any form,—whether on the transportation of subjects of commerce, the receipts derived therefrom, or the occupation or business of carrying

it on. *Leloup v. Mobile,* 127 U. S. 640, 648, 32 L. Ed. 311, 314, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *Kansas City, Ft. S. & M. R. R. Co. v. Botkin,* 240 U. S. 227, 231, 60 L. Ed. 617, 618, 36 Sup. Ct. Rep. 261, and cases cited. Plainly, the operation of appellant's pipe line is interstate commerce, and beyond the power of state taxation. *Eureka Pipe Line Co. v. Hallanan,* 257 U. S. 265, 272, 66 L. ed. 227, 231, 42 Sup. Ct. Rep. 101; *United Fuel Gas Co. v. Hallanan,* 257 U. S. 277, 66 L. ed. 234, 42 Sup. Ct. Rep. 105."

In the case of *Michigan Utilities Commission vs. Duke,* 266 U. S. 570, 69 L. Ed. 445, this Court held that where a corporation was engaged in transporting merchandise for a single manufacturer from one state to another, could not convert the business into that of a common carrier. The court used the following language:

"The act would put on plaintiff the duty to use his trucks and other equipment as a common carrier in Michigan, and would prevent him from using them exclusively to perform his contracts. This is to take from him use of instrumentalities by means of which he carries on the interstate commerce in which he is engaged as a private carrier, and so directly to burden and interfere with it. See *Kansas City Southern R. Co. v. Kaw Valley Drainage Dist.,* 233 U. S. 75, 78, 79, 58 L. Ed. 857-859, 34 Sup. Ct. Rep. 564; *Atlantic Coast Line R. Co. v. Wharton,* 207 U. S. 328, 334, 52 L. Ed. 230, 234, 28 Sup. Ct. Rep. 121; *Illinois Central R. Co. v. Illinois,* 163 U. S. 142, 153, 41 L. Ed. 107, 111, 16 Sup. Ct. Rep. 1096. And it is a burden upon interstate commerce to impose on plaintiff the onerous duties and strict liability of common carrier, and the obligation of furnishing such indemnity bond to cover the automobile bodies hauled under his contracts as conditions precedent to his right to continue to carry them in interstate

commerce. See *Barrett v. New York*, 232 U. S. 14, 33, 58 L. Ed. 483, 491, 34 Sup. Ct. Rep. 203. Clearly, these requirements have no relation to public safety or order in the use of motor vehicles upon the highways, or to the collection of compensation for the use of the highways. The police power does not extend that far. It must be held that, if applied to plaintiff and his business, the act would violate the commerce clause of the Constitution.

"Moreover, it is beyond the power of the state by legislative fiat to convert property used exclusively in the business of a private carrier into a public utility, or to make the owner a public carrier, for that would be taking private property for public use without just compensation, which no state can do consistently with the due process of law clause of the 14th Amendment. *Producers Transp Co. v. Railroad Commission*, 251 U. S. 228, 230, 64 L. Ed. 239, 241, P. U. R. 1920C, 574, 40 Sup. Ct. Rep. 131; *Chas. Wolff Packing Co. v. Court of Industrial Relations*, 262 U. S. 522, 535, 67 L. Ed. 1103, 1108, 27 A. L. R. 1280, 43 Sup. Ct. Rep. 630. On the facts above referred to, it is clear that, if enforced against him, the act would deprive plaintiff of his property, in violation of that clause of the Constitution."

In the case of *Di Santo v. Pennsylvania*, 273 U. S. 34, 71 L. Ed. 524, presented for review the act of the Legislature of the State of Pennsylvania requiring any person selling steamship tickets or orders for transportation to or from foreign countries to take out a license. The plaintiff in error was so engaged, was indicted, tried and convicted. This Court held that the act was a direct burden upon interstate commerce, and that a state could not pass a law for any purpose which placed a direct burden upon interstate commerce. The court used the following language:

"A state statute which by its necessary operation directly interferes with or burdens foreign commerce is a prohibited regulation and invalid, regardless of the purpose with which it was passed. *Shafer v. Farmers Grain Co.* 268 U. S. 189, 69 L. Ed. 909, 914, 45 Sup. Ct. Rep. 481, and cases cited. Such legislation can not be sustained as an exertion of the police power of the State to prevent possible fraud. *Real Silk Hosiery Mills v. Portland,* 268 U. S. 325, 336, 69 L. Ed. 982, 985, 45 Sup. Ct. Rep. 525. The Congress has complete and paramount authority to regulate foreign commerce and, by appropriate measure, to protect the public against the frauds of those who sell these tickets and orders. The sales here in question are related to foreign commerce as directly as are sales made in ticket offices maintained by the carriers and operated by their servants and employees. The license fee and other things imposed by the Act on plaintiff in error, who initiates for his principals a transaction in foreign commerce, constitute a direct burden on that commerce. This case is controlled by *Texas Transport & Terminal Co. v. New Orleans,* 264 U. S. 150, 68 L. Ed. 611, 34 A. L. R. 907, 44 Sup. Ct. Rep. 242, and *McCall v. California,* 136 U. S. 104, 34 L. Ed. 391, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881."

THE LEGISLATURE OF A STATE CANNOT, UNDER THE GUISE OF EXERCISING ITS POLICE POWER, DIRECTLY INTERFERE WITH INTERSTATE COMMERCE.

It is the contention of plaintiffs in error that the acts in question were not passed by the legislature of the state of Louisiana in the exercise of its legitimate police power; that the acts in question were not passed with a view to conserving the natural resources of the state; that the acts have no relation to the conservation of the natural resources of the state; that the acts are

mere subterfuges, attempted to be clothed with appropriate language which was done to make them appear as conservation measures, but in fact, they were passed for some ulterior purpose, and in their natural enforcement were intended to, and do, place a direct burden upon interstate commerce between the states. If a state legislature proposed to pass a law ostensibly in the exercise of its legitimate power, it is to be expected, in the light of past experience, as revealed by a study of your Honors' decisions, that such state legislature would endeavor, by appropriate expressions, to clothe the act with such garments as would make it appear to be the genuine thing, but as your Honors have umpired the game between the states in their efforts at local self-government, we find that it has frequently become necessary for your Honors to cast aside the declared purposes of such legislatures in passing certain acts in order that constitutional rights might be protected, and especially has such been true in the effort of this court in the exercise of its judicial functions, to prevent a state legislature from placing a direct burden upon interstate commerce. Notwithstanding the phraseology which the legislature of the State of Louisiana has used in the passage of the acts in question, notwithstanding the smug expressions of and for the necessity for conservation, it is perfectly apparent that these acts were passed for the avowed purpose of requiring plants and factories packing shrimp and canning oysters for shipment in interstate commerce, to erect such plants on Louisiana territory, and after so doing such plants are permitted, without *restriction* or *reservation,* to ship the commodities manufactured in interstate commerce.

The following authorities are directly in point:

John A. Brimmer v. Rebman, 138 U. S. 78, 34 L. ed. 862. In that case the state of Virginia passed an act regulating meat shipped into the state, which contained the following language:

"It shall be the duty of any and all persons, firms or corporations, before offering for sale in this state fresh meats, which, under the provisions of this act, are required to be inspected, to apply to the fresh meat inspector of the county or city where the same is proposed to be sold and have said meat inspected; and for a failure to do so, or for offering to sell any fresh meats condemned by said inspector, the person, firm or corporation so selling or offering to sell shall be fined not less than fifty nor more than one hundred dollars for each offense, to be recovered by any justice of the peace of the county or city where the violation occurs; provided, that in cities of fifteen thousand inhabitants or more, one-half of the fees of inspectors shall be paid into the state treasury; and provided, further, that nothing in this act shall apply to the Counties of Accomac and Northampton."

The court held that the act was a direct burden upon interstate commerce and could not be sustained, using the following language:

"The recital in the preamble that unwholesome meats were being offered for sale in Virginia can not conclude the question of the conformity of the act to the Constitution. 'There may be no purpose,' this court has said, 'upon the part of a legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may, by its necessary operation, be destructive of rights granted or secured by the constitution;' in which case, 'the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void.' *Minnesota v. Barber,* 134 U. S. 313, 319, (34:455, 457), and authorities there cited. Is the statute now before us liable to the objection that, by its necessary operation, it interferes with the enjoyment of rights granted or secured by the Consti-

tution? This question admits of but one answer. The statute is, in effect, a prohibition upon the sale in Virginia of beef, veal or mutton, although entirely wholesome, if from animals slaughtered one hundred miles or over from the place of sale. We say prohibition, because the owner of such meats can not sell them in Virginia until they are inspected there; and being required to pay the heavy charge of one cent per pound to the inspector, as his compensation, he can not compete, upon equal terms, in the markets of that commonwealth, with those in the same business, whose meats, of like kind, from animals slaughtered within less than one hundred miles from the place of sale, are not subjected to inspection at all. Whether there shall be inspection or not, and whether the seller shall compensate the inspector or not, is thus made to depend entirely upon the place where the animals, from which the beef, veal or mutton is taken, were slaughtered. Undoubtedly, a state may establish regulations for the protection of its people against the sale of unwholesome meats, provided such regulations do not conflict with the powers conferred by the Constitution upon Congress, or infringe rights granted or secured by that instrument. But it may not, under the guise of exerting its police power, or of enacting inspection laws, make discriminations against the products and industries of some of the states in favor of the products and industries of its own or of other states. The owner of the meats here in question, although they were from animals slaughtered in Illinois, had the right, under the Constitution, to compete in the markets of Virginia upon terms of equality with the owners of like meats, from animals slaughtered in Virginia or elsewhere within one hundred miles from the place of sale. Any local regulation, which, in terms or by its necessary operation, denies this equality in the markets of a state, is, when applied to the people and pro-

ducts and industries of other states, a direct burden upon commerce among the states, and therefore void. *Welton v. Missouri*, 91 U. S. 275, 261, (23:347, 349); *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465 (24:527); *Minnesota v. Barber* above cited. The fees enacted under the Virginia statute for the inspection of beef, veal and mutton, the product of animals slaughtered one hundred miles or more from the place of sale, are, in reality, a tax; and a 'discriminating tax imposed by a state operating to the disadvantage of the products of other states when introduced into the first-mentioned state, is, in effect, a regulation in restraint of commerce among the states, and, as such, is a usurpation of the powers conferred by the Constitution upon the Congress of the United States.' *Walling v. Michigan*, 116 U. S. 446, 455, (29:691, 694). Nor can this statute be brought into harmony with the Constitution by the circumstance that it purports to apply alike to the citizens of all the states, including Virginia; for, 'a burden imposed by a state upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the states, including the people of the state enacting such statute.' *Minnesota v. Barber, above* cited; *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 497, (30: 694, 697). If the object of Virginia had been to obstruct the bringing into that state, for use as human food, of all beef, veal and mutton, however, wholesome, from animals slaughtered in distant states, that object will be accomplished if the statute before us be enforced."

In the case of *Voight v. Wright*, 141 U. S. 262, 35 L. ed. 638, the state of Virginia passed an act providing for the inspection of all flour brought into the state before it could be used. The court, following the Brimmer case, held the act unconstitutional, using the following language:

"It may be remarked in passing, that in the notes to *Turner v. Maryland*, 107 U. S. 38, 51, 53, (27: 370, 375, 376), prepared by Mr. Justice Blatchford, in which is contained a list of the various inspection laws of the different states, we do not observe any laws which seem to provide for the inspection of articles other than those which are the product of the state, and this generally with a view to preparaing them for exportation.

"But, be this as it may, and without attempting to lay down any specific proposition on this somewhat difficult subject, there is enough in the case before us to decide it on satisfactory grounds, without passing upon the general right of the state to inspect imports or the qualifications to which it must necessarily be subject. The law in question is a discriminating law, and requires the inspection of flour brought from other states, when such inspection is not required for flour manufactured in Virginia. This aspect of the case brings it directly within the principles of *Brimmer v. Rebman*, 138 U. S. 78 (34: 862), decided at the present term. The law in question in that case was another statute of Virginia, making it unlawful to sell within the state any fresh meats (beef, veal or mutton) slaughtered one hundred miles, or over, from the place at which it might be offered for sale, until it had been inspected and approved as provided in the act. Mr. Justice Harlan, delivering the opinion of the court in that case, said: 'Undoubtedly, a state may establish regulations for the protection of its people against the sale of unwholesome meats, provided such regulations do not conflict with the powers conferred by the Constitution upon Congress, or infringe rights granted or secured by that instrument. But it may not, under the guise of exerting its police powers, or of enacting inspection laws, make discrimination against the products and industries of some of the

states in favor of the products and industries of its own or of other states. The owner of the meats here in question, although they were from animals slaughtered in Illinois, had the right, under the Constitution, to compete in the markets of Virginia upon terms of equality with the owners of like meats, from animals slaughtered in Virginia or elsewhere within one hundred miles from the place of sale. Any local regulation which in terms or by its necessary operation denies this equality in the markets of a state is, when applied to the people and products or industries of other states, a direct burden upon commerce among the states, and therefore, void. *Welton v. Missouri,* 91 U. S. 275, 281 (23: 347, 349); *Hannibal & St. J. R. Co. v. Husen,* 95 U. S. 465, (24: 527); *Minnesota v. Barber,* 136 U. S. 313, 319, 34: 455, 457).' "

In the case of *Brennon v. Titusville,* 153 U. S. 289, 38 L. ed: 719, the State of Pennsylvania passed an act imposing a license tax upon salesmen soliciting orders by sample for goods to be shipped from without the state. The court held that interstate commerce could not be directly burdened by the exercise of the police power, using the following language:

"Because a license may be required in the exercise of the police power, it does not follow that every license rests for its validity upon such police power. A state may legitimately make a license for the privilege of doing a business one means of taxation, and that such was the purpose of this ordinance is obvious, not merely from the fact that in the title it is declared to be for 'general revenue purposes,' but also from the further fact that, so far as we are informed by any questions from or reference to any part of the ordinance, there is no provision for any supervision, control or regulation of any business for which by the ordinance a license is required. In

other words, so far as this record discloses, this ordinance sought simply to make the various classes of business named therein pay a certain tax for the general revenue of the city. Even if it be that we are concluded by the opinion of the Supreme Court of the state that this ordinance was enacted in the exercise of the police power, we are still confronted with the difficult question as to how far an act held to be a police regulation, but which in fact affects interstate commerce can be sustained. It is undoubtedly true that there are many police regulations which do affect interstate commerce, but which have been and will be sustained as clearly within the power of the state; but we think it must be considered, in view of a long line of decisions, that it is settled that nothing which is a direct burden upon interstate commerce can be imposed by the state without the assent of congress, and that the silence of congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free."

In the case of *West v. Kansas Natural Gas Company*, 221 U. S. 229, 55 L. ed. 716, the court had under review a statute of the State of Oklahoma, which prohibited the transportation of natural gas out of the state. This court held that since gas was a subject of private ownership, the act placed a direct burden upon interstate commerce, using the following language:

"The statute of Oklahoma recognizes it to be a subject of intrastate commerce, but seeks to prohibit it from being the subject of interstate commerce, and this is the purpose of its conservation. In other words, the purpose of its conservation is in a sense commercial,—the business welfare of the state, as coal might, or timber. Both of those products may be limited in amount, and the same consideration of the public welfare which would confine

gas to the use of the inhabitants of a state would confine them to the inhabitants of the state. If the states have such power, a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals. And why may not the products of the field be brought within the principle? Thus enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequences does such power tend? If one state has it, all states have it; embargo may be retaliated by embargo, and commerce will be halted at state lines. And yet we have said that 'in matters of foreign and interstate commerce there are no state lines.' In such commerce, instead of the states, a new power appears and a new welfare,—a welfare which transcends that of any state. But rather let us say it is constituted of the welfare of all the states, and that of each state is made the greater by a division of its resources, natural and created, with every other state, and those of every other state with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States. If there is to be a turning backward, it must be done by the authority of another instrumentality than a court."

We direct your Honors' attention to the fact that the legislature of the State of Louisiana has expressly consented that shrimp and oysters may be the subject of intrastate commerce. It has not only consented that they and/or the by-products thereof may be subjects of intrastate commerce, but are expressly permitted to be come subjects of interstate commerce.

The question was re-examined in the case of *Pennsylvania v. West Virginia*, 262 U. S. 553, 67 L. ed. 1117. In that case an act of the State of West Virginia was under review, wherein the state of West Virginia as-

serted the necessity, for the use and benefit of its own citizens, that gas be kept within the state, and prohibited the exportation of gas except and only after local consummation had been supplied. This court held that gas was the subject of private ownership, and that the act necessarily burdened interstate commerce.

We respectfully submit that in this case, while the state of Louisiana may have had the right not to permit shrimp or oysters or the by-products thereof to pass into interstate commerce, but having so consented, in express terms, and the most unambiguous language, the foregoing rule is applicable.

We direct your Honors' attention to the fact that all cases dealing with the right of a state to conserve its natural resources, speak of the right as one in the exercise of the police power of the state. In other words, the right of a state to conserve its natural resources is simply the exercise of a police power, and this court has so denominated it.

In the case of *State of N. Y. v. Becker*, 241 U. S. 556, 60 L. ed. 1166; in the case of *LaCoste v. Dept. of Conservation*, 263 U. S. 545, 68 L. ed. 437; *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, and other cases therein referred to, the principles applicable to the exercise of the police power of the state are involved.

In the case of *Foote & Co. v. Stanley, Comptroller*, 232 U. S. 494, 58 L. ed. 698, Mr. Justice Lamar, speaking for the Supreme Court of the United States, held that a tax of one cent per bushel on oysters from other states, which was shown to be an amount in excess of that necessary to defray the expenses of actual inspection, was unlawful as interferring with interstate commerce. The purpose of the act, of course, was to protect Maryland oysters against the competition of oysters brought in from other states.

In the case of *Sanitary District of Chicago v. United States of America*, 266 U. S. 405, 69 L. ed. 352, the Supreme Court of the United States held that the authority of the United States to regulate interstate commerce is superior to that of the state to provide for the welfare or necessities of the inhabitants. In that case, the city of Chicago sought to take water and drain the same from Lake Michigan. The court used the following language:

> "As to its ultimate interest in the lakes, the reasons seem to be stronger than those that have established a similar standing for a state, as the interests of the nation are more important than those of any state. *Re Debs*, 148 U. S. 564, 584, 585, 599, 39 L. ed. 1092, 1102, 1103, 1107, 15 Sup. Ct. Rep. 900; *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 51 L. ed. 1038, 27 Sup. Ct. Rep. 618, 11 Ann. Cas. 488; *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 355, 52 L. ed. 828, 831, 28 Sup. Ct. Rep. 529, 14 Ann. Cas. 560; *Marshall Dental Mfg. Co. v. Iowa* 226 U. S. 460, 462, 57 L. ed. 300, 302, 33 Sup. Ct. Rep. 168.
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> "The main ground is the authority of the United States to remove obstructions to interstate and foreign commerce. There is no question that this power is superior to that of the states to provide for the welfare or necessities of their inhabitants. In matters where the states may act the action of Congress overrides what they have done. *Monongahelia Bridge Co. v. United States*, 216 U. S. 177, 54 L. ed. 435, 30 Sup. Ct. Rep. 356; Second Employers' Liability Cases, (*Mondou v. New York N. H. & H. R. Co.*), 223 U. S. 1, 56 L. ed. 327, 347, 38 L. R. A. (NS) 44, 32 Sup. Ct. Rep. 167, 1 N. C. C. A. 875. But in matters where the national importance is imminent and direct, even where Congress has been silent, the states may not act at all. *Kansas City Southern R. Co. v. Kaw Valley Drain-*

age Dist., 233 U. S. 75, 58 L. ed. 857, 859, 34 Sup. Ct. Rep. 564. Evidence is sufficient, if evidence is necessary, to show that a withdrawal of water on the scale directed by the statute of Illinois threatens and will affect the level of the lakes, and that it is a matter which can not be done without the consent of the United States even were there no international covenant in the case."

Again in the case of *Real Silk Hoisery Mills v. City of Portland*, 268 U. S. 325, 69 L. ed. 982, in order to prevent frauds on its citizens the city of Portland passed an act requiring local agents taking orders by sample to make application, to pay a license and give bond. The object of the act was claimed to be in aid of the police power of the state to protect its citizens against fraud. The real purpose of the act was to protect the citizens of the city against competition in interstate commerce. The court held that the enforcement of the act should be enjoined, using the following language:

"By a bill filed in the United States District Court for Oregon appellant challenged the ordinance and asked that its enforcement be restrained upon the ground, among others, that it interferes with and burdens interstate commerce and is repugnant to Article 1, Sec. 8, Federal Constitution. The trial court upheld the enactment and sustained a motion to dismiss the bill. This was affirmed by the circuit court of appeals, 297 Fed. 897.

"Considering former opinions of this court, we can not doubt that the ordinance materially burdens interstate commerce and conflicts with the commerce clause. *Robbins v. Taxing District*, 120 U. S. 489, 497, 30 L. ed. 694, 697, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Brennan v. Titusville*, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Court Rep. 829; *Rearick v. Pennsylvania*,

203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159; *Crenshaw v. Arkansas*, 227 U. S. 389, 57 L. ed. 565, 33 Sup. Ct. Rep. 294; *Texas Transport & Terminal Co. v. New Orleans*, 264 U. S. 150, 68 L. ed. 611, 34 A. L. R. 907, 44 Sup. Ct. Rep. 242; *Alpha Portland Cement Co. v. Mass.*, 268 U. S. 203, ante, 916, 45 Sup. Ct. Rep. 477 (May 4, 1925).

" 'The negotiation of sales of goods which are in another state for the purpose of introducing them in the state in which the negotiation is made, is interstate commerce.' Manifestly no license fee could have been required of appellant's solicitors if they had traveled at its expense and received their compensation by direct remittance from it. And we are unable to see that the burden on interstate commerce is different or less because they are paid through retention of advance partial payments made under definite contracts negotiated by them. Nor can we accept the theory that an expressed purpose to prevent possible frauds is enough to justify legislation which really interferes with the free flow of legitimate interstate commerce. See *Shafer v. Farmers Grain Co.* 268 U. S. 189, ante, 909, 45 Sup. Ct. Rep. 481, (May 4, 1925).

In the case of *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455, it is held that a Minnesota statute which requires that fresh beef, veal and mutton intended to be offered for sale as human food shall not be sold in the State of Minnesota unless the animals from which such meats are taken shall have been inspected in Minnesota before being slaughtered is a direct interference with interstate commerce and void. The court used the following language (p. 459):

"When to this is added the fact that the statute, by its necessary operation, prohibits the sale, in the state, of fresh beef, veal, mutton, lamb or pork

from animals that may have been inspected carefully and thoroughly in the state where they were slaughtered, and before they were slaughtered, no doubt can remain as to its effect upon commerce among the several states. It will not do to say—certainly, no judicial tribunal can, with propriety, assume—that the people of Minnesota may not, with due regard to their health, rely upon inspection in other states of animals there slaughtered for purposes of human food. If the object of the statute had been to deny altogether to the citizens of other states the privilege of selling, within the limits of Minnesota, for human food, any fresh beef, veal, mutton, lamb or pork, from animals slaughtered outside of that state, and to compel the people of Minnesota, wishing to buy such meats, either to purchase those taken from animals inspected and slaughtered in the state, or to incur the cost of purchasing them, when desired for their own domestic use, at points beyond the state, that object is obtained by the act in question. Our duty to maintain the Constitution will not permit us to shut our eyes to these obvious and necessary results of the Minnesota statute. If this legislation does not make such discrimination against the products and business of other states in favor of the products and business of Minnesota, as interferes with and burdens commerce among the several states, it would be difficult to enact legislation that would have that result."

The court also used the following language, p. 460:

"It is, however, contended, in behalf of the state, that there is in fact no interference, by this statute, with the bringing of cattle, sheep and swine into Minnesota from other states, nor any discrimination against the products or business of other states, for the reason—such is the argument—that the statute requiring an inspection of animals on the hoof,

as a condition of the privilege of selling, or offering for sale, in the state, the meats taken from them, is applicable alike to all owners of such animals, whether citizens of Minnesota or citizens of other states. To this we answer that a statute may upon its face, apply equally to the people of all the states, and yet be a regulation of interstate commerce which a state may not establish. A burden imposed by a state upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the states, including the people of the state enacting such statute. *Robbins v. Shelby County Taxing District,* 120 U. S. 489, 497, (30: 694, 697); *State Freight Tax Case,* 82 U. S. 15 Wall. 232, (21: 146). The people of Minnesota have as much right to protection against the enactments of that state, interfering with the freedom of commerce among the states, as have the people of other states. Although this statute is not avowedly, or in terms, directed against the bringing into Minnesota of the products of other states, its necessary effect is to burden or obstruct commerce with other states, as involved in the transportation into that state, for purposes of sale there, of all fresh beef, veal or mutton, lamb or pork, however free from disease may have been the animals from which it was taken."

The identical question was presented in the case of *Lochner v. State of New York,* 198 U. S. 45, 49 L. ed. 937. In that case, the constitutionality of a labor law of New York forbidding adults from working in bakeries for more than a certain number of hours daily was sought to be justified on the ground that it was the exercise of the police power of the state. The Supreme Court of the United States used the following language in holding that the Act violated the Fourteenth Amendment to the Constitution of the United States, and had no reference to any legitimate exercise of the police power of the State of New York.

"It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so, when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. The purpose of a statute must be determined from the natural and legal effect of the language employed, and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statute when put into operation, and not from their proclaimed purpose. *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455; *Brimmer v. Rebman*, 138 U. S. 78, 34 L. ed. 862. The court looks beyond the mere letter of the law in such cases. *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064."

The case of *William Adair v. United States*, 208 U. S. 161, 52 L. ed. 436, is directly in point. In that case there was presented for review an act of Congress forbidding an interstate railroad company from discharging an employee because he was a member of a labor union. This congressional enactment was sought to be justified on the ground that Congress had the right to regulate interstate commerce. The court held that the act violated the Fifth Amendment to the Constitution of the United States; that while the act purported to regulate interstate commerce, as a matter of fact, it had no relation thereto; that under the guise of regulating interstate commerce the right of contract was interfered with. The court used the following language:

"Looking alone at the words of the statute, for the purpose of ascertaining its scope and effect, and determining its validity, we hold that there is no such connection between interstate commerce and

membership in a labor organization as to authorize Congress to make it a crime against the United States for an agent of an interstate carrier to discharge an employee because of such membership on his part. If such a power exists in Congress, it is difficult to perceive why it might not by absolute regulation require interstate commerce under penalties to employ, in the conduct of its interstate business, only members of labor organizations, or only those who are not members of such organizations, which could not be recognized as existing under the Constitution of the United States. No such rule of criminal liability as that to which we have referred can be regarded as, in any just sense, a regulation of interstate commerce. We need scarcely repeat what this court has more than once said that the power to regulate interstate commerce, great and paramount as that power is, can not be exerted in violation of any fundamental right secured by other provisions of the Constitution. *Gibbons v. Ogden,* 9 Wheatley, 196, 6 L. ed. 23, 70; *Lottery Case,* 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321."

The case of *W. C. Hammer, United States Attorney v. Dagenhart,* 247 U. S. 251, 62 L. ed. 1101, presenting a very interesting question. Under the guise of regulating interstate commerce, Congress passed an act prohibiting the employment of minors in factories for more than a certain number of hours daily, and providing that no goods manufactured should be shipped in interstate commerce where the act was violated. The act was passed and sought to be maintained as one regulating interstate commerce. The Supreme Court of the United States held, however that the act had no such relation to interstate commerce as justified its passage, using the following language:

"In interpreting the Constitution, it must never be forgotten that the nation is made up of states, to which are intrusted the powers of local govern-

ment, and to them and to the people, the powers not expressly delegated to the national government are reserved. *Lane County v. Oregon,* 7 Wall. 71, 19 L. ed. 101. The power of the states to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent, and has never been surrendered to the general government. *New York v. Miln,* 11 Peters 102, 139, 9 L. ed. 648, 662; *Slaughter-House Cases,* 16 Wall 36, 63, 21 L. ed. 394, 404; *Kidd v. Pearson,* supra. To sustain this statute would not be, in our judgment, a recognition of the lawful exertion of congressional authority over interstate commerce, but would sanction an invasion by the Federal power of the control of a matter purely local in its character, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the states.

"We have neither authority nor disposition to question the motives of Congress in enacting this legislation. The purposes intended must be attained consistently with constitutional limitations, and not by an invasion of the powers of the states. This court has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, federal and state, to the end that each may continue to discharge, harmoniously with the other, the duties intrusted to it by the constitution.

"In our view, the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of children in factories and mines within the state,—a purely state authority. Thus, the act in a two-fold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce,

but also exerts a power as to a purely local matter to which the Federal authority does not extend. The far-reaching result of upholding the act can not be more plainly indicated than by pointing out that if Congress can thus regulate matters intrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the states over local matters may be eliminated, and thus our system of government be practically destroyed.

"For these reasons, we hold that this law exceeds the constitutional authority of Congress. It follows that the decree of the District Court must be affirmed."

Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. ed. 49, is what is known as the Oleomargarine case. In that case it appeared that the state of Pennsylvania had an act which prohibited the importation into the state of Oleomargarine. The latter named commodity was an imitation of butter. It was harmless if manufactured pure, but might become harmful if not properly manufactured. On account of the difficulty of detecting impurity, the legislature of the state of Pennsylvania, for the professed purpose of protecting the health of its citizens, but for the actual and concealed purpose of protecting dairy interests, excluded oleomargarine from importation and sale into the state altogether. The Supreme Court of the United Staates held that the act was one regulating interstate commerce, using the following language:

"There is contained in the 17th volume of the Encyclopaedia Britannica an extract from a report by the secretary of the British ambassy at Washington, in 1880, describing the method of obtaining oleomargarine oil. This shows the article was then well known.

"In *Ex Parte Scott* and others the circuit court for the eastern district of Virginia (66 Fed. Rep. 45), speaking by Hughes, district judge, said: 'It is a fact of common knowledge that oleomargarine has been subjected to the severest scientific scrutiny, and has been adopted by every leading government in Europe as well as America, for use by their armies and navies. Though not originally invented by us, it is a gift of American enterprise and progressive invention to the world. It has become one of the conspicuous articles of interstate commerce and furnishes a large income to the general government annually. * * * * It is entering rapidly into domestic use and the trade in oleomargarine has become large and important. The attention of the national government has been attracted to it as a source of revenue. * * * Provincial prejudice against this now staple article of commerce is natural, but a city of the size and prospects of Norfolk as a world's entreport ought not to be foremost in manifesting such a prejudice.'

"In *People v. Marx,* 99 N. Y. 377 (52 Am. Rep. 34), which was a prosecution under the New York statute (chap. 202, Laws of 1884) prohibiting the manufacture or sale of oleomargarine, the court of appeals of New York held the act unconstitutional. It appears from the opinion that on the trial of that action on the part of the defendant 'it was proved by distinguished chemists that oleomargarine was composed of the same elements as dairy butter. That the only difference between them was that it contained a smaller proportion of fatty substance known as butterine. That this butterine exists in dairy butter only in a small proportion—from three to six per cent. That it exists in no other substance than butter made from milk and it is introduced into oleomargarine butter by adding to oleomargarine stock some milk, cream, or butter and churn-

ing, and when this is done it has all the elements of natural butter, but there must always be a smaller percentage of butterine in the manufactured product than in the butter made from milk. The only effect of the butterine is to give flavor to the butter, having nothing to do with its wholesomeness. That the oleoginous substances in the oleomargarine are substantially identical with those produced from milk or cream. Professor Chandler testified that the only difference between the two articles was that dairy butter had more butterine. That oleomargarine contained not over 1 per cent of that substance, while dairy butter might contain four or five per cent, and that if four or five per cent of butterine was added to the oleomargarine, there would be no difference; it would be butter; irrespective of the sources, they would be the same substance. According to the testimony of Professor Morton, whose statement was not controverted or questioned oleomargarine, so far from being an article devised for purposes of deception in trade, was devised in 1872 or 1873 by an eminent French scientist who has been employed by the French government to devise a substitute for butter.' This extract from the opinion in the New York case, speaking of the testimony given before the trial judge, is not quoted for the purpose of proving the facts therein stated, but for the purpose of showing that as long as the time when that case was decided—June, 1885— the article was then well known as an article of food, and manufactured as a substitute for butter, and we may notice from some of the histories of the article the fact (which is stated in the opinion) that it was first devised as long ago as 1872 or 1873 by a French gentleman who had been employed by the French government to devise a substitute for butter. The article is a subject of export, and is largely used in

foreign countries. Upon all these facts we think it apparent that oleomargarine has become a proper subject of commerce among the states and with foreign nations.

"The general rule to be deduced from the decisions of this court is that a lawful article of commerce cannot be wholly excluded from importation into a state from another state where it was manufactured or grown. A state has power to regulate the introduction of any article, including a food product, so as to insure purity of the article imported, but such police power does not include the total exclusion even of an article of food.

"In *Minnesota v. Barber*, 136 U. S. 313 (34: 455, 3 Inters. Com. Rep. 185), it was held that an inspection law relating to an article of food was not a rightful exercise of the police power of the state if the inspection prescribed were of such a character or if it were burdened with such conditions as would wholly prevent the introduction of the sound article from other states. This was held in relation to the slaughter of animals whose meat was to be sold as food in the state passing the so-called inspection law. The principle was affirmed in *Brimmer v. Rebman*, 138 U. S. 78, (34: 862), (3 Inters. Com. Rep. 485), and in *Scott v. Donald*, 165 U. S. 58, 97, (41: 632, 644).

"Is the rule altered in a case where the inspection or analysis of the article to be imported is somewhat difficult and burdensome? Can the pure and healthy food product be totally excluded on that account? No case has gone to that extent in this court. The nearest approach to it was the case of *Pierce v. New Hampshire*, 46 U. S. 5 How. 504 (12: 256), involving the importation of intoxicating liquors. But in *Leisy v. Harden*, 135 U. S. (34: 128,

3 Inters. Com. Rep. 36), the New Hampshire case was overruled, and it was stated by the present Chief Justice, in speaking for the court, that 'whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any article which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by state laws amounting to regulations, while they retain that character; although, at the same time, if directly dangerous in themselves the state may take appropriate measures to guard against injury before it obtains complete jurisdiction over them. To concede to a state the power to exclude, directly or indirectly, articles so situated, without congressional permission, is to concede to a majority of the people of a state, represented in the state legislature, the power to regulate commercial intercourse between the states, by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States, represented in Congress, and its possession by the latter was considered essential to that more perfect union which the Constitution was adopted to create.' "

There are many cases other than those above cited holding that a state cannot impose a tax upon persons who act as agents for the owners of property without the state, which agents make sales by samples within the state. *Stockard v. Morgan*, 185 U. S. 27, 46 L. ed. 785; *Asher v. Texas*, 128 U. S. 129, 32 L. ed. 586.

In the case of *R. R. Co. v. Mays*, 201 U. S. 321, 50 L. ed. 772, it appeared that in the attempted exercise of its police power the legislature of Texas passed an act requiring a railroad company to furnish cars for a shipper at any designated point on demand, in writing. The act was intended to aid growers and shippers of

cattle in order that shipping facilities would be promptly furnished, the legislature of Texas claiming the right to foster the cattle-raising business by requiring prompt movements. The Supreme Court of the United States held in the above case that the act was a burden upon interstate commerce.

In the case of *Central R. R. v. Murphy*, 196 U. S. 194, 49 L. ed. 444, in order to enable its citizens to collect promptly a claim against a railroad company for damage or delays in freight, the duty of collecting information in respect to the handling of the freight on the part of connecting carriers was imposed on the delivering carrier. The act was passed for the purpose of protecting citizens of the states in the collection of just demands, and was claimed to be in the exercise of the legitimate police power of the state. The Supreme Court of the United States held that the act was one affecting interstate commerce and void.

In the case of *Atlantic Coast Line v. Wharton*, 207 U. S. 328, 52 L. ed. 230, it appeared that the state legislature claiming to be acting in the interest of its people for their health, safety and well-being, passed an act requiring all passenger trains to stop interstate through trains at certain designated stations in the state. The Supreme Court of the United States held that the act was void as imposing a burden on interstate commerce.

In the case of *Southern R. R. Co. v. King*, 217 U. S. 524, 54 L. ed. 868, it was held, however, that a state could validly regulate the operation of railroad trains engaged in interstate commerce, and provide their speed through municipalities where the same did not directly interfere with interstate commerce.

In the case of *South Covington R. R. v. Covington*, 235 U. S. 537, 55 L. ed. 350, L. R. A. 1915 F 792, the State of Kentucky passed an act requiring interstate

street cars carrying passengers in the winter time to provide that the temperature should not drop below 50 degrees. The state claimed in the passage of the act to be acting in the exercise of its police power for the health and well-being of its citizens. The Supreme Court of the United States held that the act was a direct interference with interstate commerce and void.

In the case of *Missouri Pacific R. R. v. North Dakota*, 236 U. S. 585, 39 L. ed. 735, L. R. A. 1917F. 1146, the legislature of the state of North Dakota, in order to encourage and build up local industries, establishes a very low rate for carrying intrastate freight. The state claimed to be acting for the well-being of its citizens in the exercise of its police power. The Supreme Court of the United States held that the act was void.

In the case of *Seaboard Air Line v. Blackwell*, 244 U. S. 310, 61 L. ed. 1160, L. R. A. 1917 F. 1184, the legislature of the state of Georgia passed an act intended to promote the safety and well-being of its citizens, that an engineer of a train of cars should so control his train as to be able to stop at all crossings and that he should begin to check his train 400 yards from the crossing. The Supreme Court of the United States held the act a direct interference with interstate commerce and void.

In the case of *Pittsburgh Coal Co. v. Bates*, 156 U. S. 577, it was held that no state has the power to make any law or regulation which will affect free and unrestrained intercourse and trade between the states.

An act of the state legislature in the exercise of its police power, however, is not void as an interference with interstate commerce where such commerce is only indirectly affected.

A typical case is that of *Austin v. State of Tennessee*, 179 U. S. 343, 45 L. ed. 124. In that case it appeared that the legislature of the state of Tennessee prohibiting

the sale within the state of cigarettes was a valid exercise of the police power of the state in the protection of the health, morals and well-being of its citizens. The court used the following language:

> "We have had repeated occasion to hold, where state legislation has been attacked as violative either of the power of Congress over interstate commerce, or of the 14th Amendment of the Constitution, that, if the action of the state legislature were as a bona fide exercise of the police power, and dictated by a genuine regard for the preservation of the public health or safety, such legislation would be respected, though it might interfere, indirectly with interstate commerce. While, as was said, in *Holden v. Hardy*, 169 U. S. 366, 392, 42 L. ed. 780, 791, 18 Sup. Ct. Rep. 383, 'the police power connot be put forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety, or morals, or the statement of public nuisances, and a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests. Thus while in *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527, it was held that a statute of Missouri, prohibiting the driving or bringing of any Texas, Mexican, or Indian cattle into the state, was in conflict with the interstate commerce clause of the Constitution, it was subsequently held that the introduction of diseased cattle might be prohibited altogether, or subjected to such regulations as the legislature might choose to impose. *Missouri K. & T. R. Co. v. Haver*, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488. So, too, although it was held in *Barber v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357, and in *Soon Hing v. Crowley*, 113 U. S. 703 28 L. ed. 1145, 5 Sup. Ct. Rep. 730, that a municipal ordinance prohib-

iting laundry work within certain territorial limits and within certain hours was purely a police regulation, such an ordinance was void, if it conferred upon the municipal authorities arbitrary power at their own will and without regard to discretion in the legal sense of the term, to give or withhold consent as to persons or places, without regard to the competency of the persons applying, or the propriety of the places selected for carrying on business. *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064. In delivering the opinion Mr. Justice Matthews observed: 'Though the law itself be fair and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an equal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.''

In other words, the state could interfere with the sale of the cigarettes after they came into and were part of the property of the state, but could not interfere with the importation of the cigarettes into the state. It is, of course, perfectly apparent, however, that manufacture with intent to sell in interstate commerce is not interstate commerce. *U. S. v. E. C. Knight Co.*, 165 U. S. 1, 39, L. ed. 325.

Whenever the state police power and the regulation of interstate commerce come into conflict, the police power must yield. *Arkansas v. Coal Co.*, 183 U. S. 185, 46 L. ed. 144.

In the case of *Mississippi Railroad Commission v. Ill. Cent.* 203 U. S. 333, 51 L. ed. 209, the supreme court of the United States held that interstate commerce was unconstitutionally interfered with by an order of the

Mississippi Railroad Commission requiring the railway company to stop its interstate mail trains at a specified county seat.

In the case of *Collins v. New Hampshire*, 171 U. S. 30, 43 L. ed. 60, the supreme court of the United States held an act of the state of New Hampshire invalid which provided that oleomargarine should not be sold as substitute for butter unless it was a pink color. The state of New Hampshire asserted the right to pass an act in order to protect the health and well-being of its citizens. The court held that the act was a direct burden upon interstate commerce and was invalid. Doubtless the purpose of the act was to protect local producers of butter in the state from competition of foreign states.

In the case of *Hannibal R. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527, it appeared that the state of Missouri in that case passed an act claiming to act in the exercise of its police power, preventing the driving or conveying of Texas, Mexican or Indian cattle into or through the state between the first day of March and the first day of December. It was contended by the state that resident cattle were liable to disease from such cattle during these months. The supreme court of the United States held the act unconstitutional, using the following language:

> "It seems hardly necessary to argue at length, that, unless the statute can be justified as a legitimate exercise of the police power of the state, it is a usurpation of the power vested exclusively in Congress. It is a plain regulation of interstate commerce; a regulation extending to prohibition. Whatever may be the power of a state over commerce that is completely internal, it can no more prohibit or regulate that which is interstate than it can that which is with foreign nations. Power over one is given by the Constitution of the United States, to Congress, in the same words in which it is given over the

other, and in both cases it is necessarily exclusive. That the transportation of property from one state to another is a branch of interstate commerce is undeniable, and no attempt has been made in this case to deny it.

"The Missouri Statute is a plain interference with such transportation; an attempted exercise over it of the highest possible power—that of destruction. It meets at the borders of the state a large and common subject of commerce, and prohibits its crossing the state line during two thirds of each year, with a proviso, however, that such cattle may come across the line loaded upon a railroad car or steamboat, and pass through the state without being unloaded. But even the right of steamboat owners and railroad companies, to transport such property through the state, is loaded by the law with onerous liabilities, because of their agency in the transportation. The object and effect of the statute are, therefore, to obstruct interstate commerce, and to discriminate between the property of citizens of other states. This court has heretofore said that interstate transportation of passengers is beyond the reach of a State Legislature. And if, as we have held, state taxation of persons passing from one state to another, or a state tax upon interstate transportation of passengers, is prohibited by the Constitution, because a burden upon it, a fortiori, if possible, is a state tax upon the carriage of merchandise from state to state. Transportation is essential to commerce, or rather it is commerce itself; and every obstacle to it, or burden laid upon it by legislative authority, is regulation. Case of *State Freight Tax*, 15 Wall., 232, 21 L. ed. 146; *Ward v. Maryland*, 12 Wall., 418, 20 L. ed. 449; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347; *Henderson v. Mayor of N. Y.* 92 U. S. 259, 23 L. ed. 657; *Chy Lung v. Freeman*,

92 U. S. 275, 23 L. ed. 550. The two latter of these cases refer to obstructions against the admission of persons into a State, but the principles asserted are equally applicable to all subjects of commerce.

"We are thus brought to the question whether the Missouri Statute is a lawful exercise of the police power of the state. We admit that the deposit in Congress of the power to regulate foreign commerce and commerce among the states was not a surrender of that which may properly be denominated police power. What that power is, it is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of domestic order, morals, health and safety. As was said in *Thorpe v. R. R. Co.* 27 Vt. 149, 'It extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state. According to the maxim, *Sic utero tuo ut aliunum non laedas,* which, being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which every one may use his own and not to injure others.' It was further said, that, by the general police power of a state, 'persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the state; of the perfect right of the legislature to do which no question ever was, or upon acknowledged principles ever can be made, so far as natural persons are concerned.' It may also be admitted that the police powers of a state justify the adoption of precautionary measures against social evils. Under it, a state may legislate to prevent the spread of crime or pauperism or disturbances of the peace. It may exclude from its limits, convicts, paupers, idiots and lunatics, and persons likely to become a public charge, as well as persons afflicted by contagious or infectious dis-

eases; a right founded, as intimated, in *The Passenger Cases,* 7 How. 283, by Grier, J., in the sacred law of self-defense. Vide, *Neff v. Penoyer,* 2 Sawyer, 283.

We propose now to take the facts in this case and show the court that these acts were passed solely and only for the purpose of regulating the place where the respective commodities should be manufactured, and in so doing a direct burden is placed upon interstate commerce, which is prohibited.

In *Weaver v. Palmer,* 270 U. S. 402, 70 L. ed. 654, your Honors held that in determining as to whether or not an act is unconstitutional, as applied to constitutional guaranties, you would look to all the facts, those which were proven, and those of which the court took judicial notice. In that case the court used the following language:

> "The question for decision is whether the provision purporting absolutely to forbid the use of shoddy in comfortables violates the due process clause or the equal protection clause. The answer depends on the facts of the case. Legislative determinations express or implied are entitled to great weight; but it is always open to interested parties to show that the legislature has transgressed the limits of its power. *Pennsylvania Coal Co. v. Mahon,* 260 U. S. 393, 413, 67 L. ed. 322, 325, 28 A. L. R. 1321, 43 Sup. Ct. Rep. 158. Invalidity may be shown by things which will be judicially noticed. (*Quong Wing v. Kirkendall*), 223 U. S. 59, 64, 56 L. ed. 350, 352, 32 Sup. Ct. Rep. 192), or by facts established by evidence. The burden is on the attacking party to establish the invalidating facts. See *Minnesota Rate Cases* (*Simpson v. Shepard*) 230 U. S. 352, 452, 57 L. ed. 1511, 1563, 48 L. R. A. (N. S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18."

See also directly in point, *United States v. Katz* 271 U. S. 354, 70 L. ed. 986.

The proven facts show that the packing of shrimp at Biloxi, Mississippi, commenced fifty years ago from a small beginning; that the industries were undertaken by Louisiana citizens who came to Biloxi, Mississippi, on account of the favorable surroundings therefor; that the descendants of the originators of these industries are still in business in Biloxi; that they have taken these commodities, which were of small value, and by their thrift and industry and efficiency, have built up a world market in each of these commodities; that in 1910 the oyster industry had increased to such an extent as that the Louisiana legislature looked with envious eyes upon the industry and sought to remove the same to its own shores by the act of 1910, to which we have referred your Honors, which act was stricken down. At that time the shrimp industry was so insignificant as that the legislature of the state of Louisiana paid no attention to it. As time progresses, both the shrimp and the oyster industry increases. The state of Louisiana then determines to obtain these industries for its own territory. It is perfectly apparent that it not only wanted the industries in order to afford subjects of taxation, employment for its unemployed, to give value to its lands, but it is perfectly apparent from the record that these thrifty, energetic people at Biloxi, as the business passed from father to son, had developed a system which was both efficient and economical, and the state of Louisiana determined not only that it would obtain these industries but that the packers from the coast, who had so well managed the industries, would be required, in order to obtain the supply of raw material, to move to Louisiana territory.

The following facts in cause No. 768 were proved and not denied. R. H. Chinn in affidavit (Tr. 101) at page 102 states that when the legislation was being discussed before the Louisiana legislature, the attorney for

the proponents of the bill publicly and openly stated that the purpose of the legislation was to compel shrimp caught in Louisiana to be manufactured therein. The affidavit contains the following language:

> "Affiant further states of his own knowledge that he was present at a meeting of a committee of the Senate and the Legislature of the State of Louisiana where the so-called shrimp act was being discussed, the same having been referred to said committee by the State Legislature, and at said meeting the Hon. John Dymond one of the attorneys representing the interest seeking such legislation, was questioned as to the value of shrimp hulls as a fertilizer and stated that the purpose of this act was not to conserve said shrimp hulls but that they were included in the act only for the purpose of compelling all the shrimp caught in Louisiana to be manufactured in Louisiana." (Tr. 102).

The gentleman referred to, Hon. John Dymond, is one of the distinguished counsel in this case, who has shown ability in securing the passage of the acts in question, as well as in sustaining the acts up to this date. Defendants in error introduced an affidavit of Mr. Dymond (Tr. 118), in which the following language appears: (Tr. 121).

> "I know that there are a number of sites, both in the Parishes of Plaquemines and St. Bernard, readily available for the erection of additional shrimp canneries, in the event that any of the Mississippi canneries desire to come into Louisiana. I know that several canneries have already come into the State of Louisiana and established factories here and are operating, who formerly operated in Mississippi. I know that the canneries of Louisiana are amply able to handle the products of the waters of the State of Louisiana of a sea food character for canning and packing."

Defendants in error likewise introduced the affidavit of Mr. Chas. Greiner (Tr. 124) Record No. 768, which affidavit contains the following language (Tr. 126):

"I have been engaged in the canning business for the past nineteen years, fifteen years in Louisiana, and I am thoroughly familiar with the shrimp canning industry in Louisiana and with those who are engaged therein and the plants engaged in that industry and also available locations for additional plants in Louisiana. There are a number of available sites in Louisiana for shrimp canning plants which have not yet been occupied by canning factories. The capacity of the canneries of Louisiana is adequate to take care of all of the shrimp that may be caught in Louisiana waters and certainly if the available sites are used by any new canning industries coming into Louisiana they can adequately take care of all shrimp caught within Louisiana waters. I am familiar with the condition of the waters east of the Mississippi River in the Parishes of St. Bernard and Plaquemines, State of Louisiana, and I note that the majority of the shrimp taken by the Mississippi canners for packing in Mississippi have been taken by them from the waters of St. Bernard and Plaquemines Parishes in Louisiana, and south of the boundary lines established by the Supreme Court of the United States in the suit of *State of Louisiana v. State of Mississippi.*

"The parishes of counties of St. Bernard and Plaquemines are possessed of vast natural resources in the waters of these two parishes, but these two parishes have heretofore not been given the advantage of the utilization of the products of their waters because the same have been taken into the State of Mississippi and the industry of manufacturing these natural products into articles of commerce carried on into the State of Mississippi not-

withstanding the fact that there are many suitable sites for canning factories in the St. Bernard and Plaquemines Parishes presently unoccupied and where adequate labor might be secured and properly housed and cared for."

Mr. Grenier was one of the proponents of these measures, and was very influential in securing the passage thereof.

Likewise the affidavit of James V. Dunbar was introduced by defendants in error in cause No. 768 (Tr. 128). The affidavit contains the following language (Tr. 130):

"We have a market for all of our shrimp bran, as we have a contract with the Marine Fertilizer and Feed Company for a period of five years with an optional renewal of five years not only to handle our entire product but any raw material that we may acquire from others and dried in any of our plants. We also have received frequent inquiries from other sources for this product especially from New York and from Germany.

"I have been connected with the canning and packing industry for thirty-five years and I am thoroughly familiar with the industry both in the State of Mississippi and in the State of Louisiana.

"I am familiar with the territory in the State of Louisiana adjacent to the waters of the Parishes of St. Bernard and Plaquemines in the State of Louisiana, and I know that there are many sites that may be acquired for shrimp packing and canning factories which are as yet unoccupied. I am confident that the canning factories of Louisiana, those now in existence and those that might be erect-

ed at these desirable points can adequately care for all of the shrimp that Louisiana waters may produce.

"The waters of the Parishes (or counties) of St. Bernard and Plaquemines are great sources of sea food supply. Heretofore this raw material fished from the waters of St. Bernard and Plaquemines Parishes has been taken into the State of Mississippi and the industry carried on in the State of Mississippi of canning and packing these sea food products and converting them into commercial commodities to the advantage of the State of Louisiana."

In case No. 769 the defendant introduced the affidavit of James McConnell (Tr. 87). Mr. McConnell, one of the officers of the Conservation Department, in his affidavit, concedes that the purpose of the passage of the law was to bring factories to Louisiana. The following quotation is from the affidavit introduced by defendants in error (Cause No. 769—page 88):

"The provisions of this law, which was adopted in the legislative session of 1926, these provisions applying to the prohibition of the exportation of oysters in the shell from Louisiana, did not go into effect until January 1, 1928, this being done to give the oyster canning factories in Mississippi an opportunity to acquire sites and build their factories in Louisiana.

"A similar provision in the shrimp law of Louisiana brought several of the shrimp canning factories into Louisiana where they might enjoy the natural resources from the waters of Louisiana.

"There are many sites in Louisiana that would be suitable for the erection of oyster canning factories in this state. Dunbar-Dukate Company has

bought a site at Slidell, Louisiana, to which he intends to move his Biloxi, Mississippi, canning factory as soon as this Louisiana law governing oysters is enforced."

So much for the proof. Now let us turn to the acts themselves. It must be borne in mind that in the meantime both shrimp and oysters have become mere commodities of interstate commerce.

In the New International Encyclopaedia, Vol. 17, p 669, the following statement is made concerning the oyster industry in the United States:

"The greatest production is in Chesapeake Bay, where the principal yield is from the natural beds. Most of the oysters from New England and from New York and the outer coast of New Jersey are produced by planted beds; the entire yield of the Pacific Coast is similarly derived, and there has been recently a considerable increase in oyster culture in New Jersey, Virginia, and other states. The number of persons engaged in the industry is estimated at upward of 60,000, but as many of them are employed part of the year in other fisheries, farming, etc., definite statistics are not available. Baltimore is the most extensive market and New York has a considerable export trade with Europe. Chesapeake Bay supplies more of the oysters of the United States than any other distinctly marked area, Long Island Sound ranking next in the output. The census reports show the total oyster product of the United States at 22,195,000 bushels in 1880, 22,284,000 bushels in 1889, 26,910,000 in 1897, and 33,330,000 in 1908. Of the 1908 product 16,983,000 bushels, or practically one-half of the total, are accredited to the Middle Atlantic States, 5,332,600 to the New England States, 4,364,000 to the South Atlantic States, 6,343,000 to the South Gulf States, and 309,-

000 to the Pacific Coast. The Middle Atlantic States, however, show a less total 1908 than in 1897, while New England in the South Atlantic, and the Gulf group show in each case an increase of more than 100 per cent in the same period. In 1880 the Middle Atlantic States supplied 94 per cent of the output of the United States, but in 1908 only 51 per cent. The total value of the oyster product in the United States in 1908 was $15,713,000, forming 29 per cent of the value of all fishery products of that year. The value of the oyster product of the Middle Atlantic States in 1908 was $8,842,000 against $10,288,000 in 1900, while that of the other sections doubled in the same time. The gain of the other sections when compared with the Middle Atlantic section, was apparently due in large part to the fact that a large share of the product of the area of increase was from cultivated beds, while most of the Middle Atlantic product was from public beds. No complete census of the oyster industry has been taken since 1908. A report on Maryland and Virginia in 1912, by the Bureau of Fisheries, puts the products of those States at 11,716,000 bushels, and that of the South Atlantic at 1,701,000 bushels."

In Nelson's Perpetual Loose Leaf Encyclopaedia, Vol. IX, page 136, the following language is used:

"The oyster crop of the North Atlantic greatly exceeds that of all other oyster fisheries combined, amounting to 37,000,000 out of a world total of 42,000,000 bushels for the season 1911-12. The largest known oyster ground in the world is Chesapeake Bay, with Long Island Sound second. The yield of the former in 1911-12 was 6,000,000 bushels from the Virginia shore, and 5,500,000 bushels from the Maryland shore. Of the Long Island Sound Fisheries, Connecticut stood first, with a yield of 4,000,000 bushels, and New York (Long Island) second,

with 3,250,000 bushels. The Sound oysters, however, bring double the market price of those from Chesapeake Bay. About 6,000,000 bushels are harvested annually in the Gulf of Mexico, the Louisiana fisheries leading. The harvest on the Pacific Coast reaches about 350,000 bushels."

Turning to the Shrimp Act; Section 4 of this act permits residents of the state of Louisiana and corporations, operating drying plants, operating factories or drying plants within the state, to catch shrimp during the open season without limit or restriction as to the quantity to be caught. There are regulations as to the dates during which they may not be taken (Sec. 5); the size of the shrimp which may be taken (Section 6); the kind of trawls which may be used (Section 7). Section 13 provides, in express terms, that after the heads and hulls are taken from the shrimp, they may be shipped in interstate commerce without restriction or reservation, and after the heads and hulls are treated in the manner provided in the act, they likewise may be dealt with as the owner sees fit. Sections 14, 15 and 16 provide for the issuing of license. Section 19 provides the punishment for violation of the act. By section 28 canneries out of the state are allowed a certain length of time to adjust themselves to the act, that is to say, to move to the state of Louisiana.

When we turn to the Oyster Act, sections 2 and 3 are almost identical with sections 4 and 13 of the Shrimp Act. They each expressly permit the purchase and sale of oysters within the state of Louisiana, and permit the sale and every part thereof in interstate commerce, after the shrimp and oysters shall have been packed and canned and the hulls and shells treated, as provided in the act, to pass into interstate commerce. Section 13 of the oyster act provides the license to be paid therefor and contains the following provision in respect to vessels or cargoes:

"Vessels purchasing for resale, oysters to make up a cargo, shall procure a license permitting the conduct of such business, which license shall be graded upon the tonnage of the boat employed and on the following basis, to-wit:"

Sections 22, 23 and 24 provide for the punishment for violation of the act; and section 29 extends an invitation to canners outside of the state to adjust their business to the changed conditions by moving their plants to Louisiana.

The entire purpose of the law, as shown by the Legislation, by undisputed facts, and from an examination of the acts under review, demonstrate that the legislature of the state of Louisiana did not intend, in the enactment of the measures complained of, to keep either shrimp or oysters in the state of Louisiana, but the acts were passed with full knowledge that they were articles of interstate commerce, and the entire machinery, provided for, and set up in the measures complained of, contemplate the preparation for and the shipment of the shrimp and oysters in interstate commerce. In the preparation of these commodities for shipment in interstate commerce, the state of Louisiana contemplates and requires the full measure of protection afforded by the clause of the constitution of the United States. The acts and each of them, with the legislative history thereof, interpreting the acts in the light of the undisputed facts in this case, establish that the people of Louisiana in the passage thereof, did not contemplate or intend that these articles would remain in the state for the benefit of its people as a food, but intended that they should immediately pass into interstate commerce, and in the world market for such commodities in competition with other states and countries. Therefore, we respectfully submit that the acts were not passed by the legislature of the state of Louisiana in the legitimate exercise of their police power, but under the guise of exercising the police power of the state such measures were enact-

ed, and in their natural and normal operation directly burden interstate commerce between the states. The exexercise of the police power, which includes the conservation of its natural resources, is a shield to be used by a state in order to secure the welfare of its people. Such right, however, must be exercised in accordance with and subject to the fundamental law of the land. The Congress of the United States granted these lands with the natural resources thereof to the sovereign state of Louisiana, impressed, however, with the constitution and laws of the United States, the supreme law of the land. Such right can never be exercised as a sword to destroy commerce between the states of the Union. The acts were not passed with any purpose of keeping the commodities within the borders of the state, nor for the purpose of regulating the sale and transfer thereof among the citizens of the state in intrastate commerce.

The position of opposing counsel is that the state held the title to the shrimp and oysters in trust for its people, and that it may attach any condition which it sees fit to the passing of the title from the state as trustee to other persons. The fallacy of this position lies in the fact that it assumes the right of the state, for all substantial purposes, to divest itself of title to the shrimp and oysters and impose as a condition precedent to the passage of the title, a condition which violates the constitution of the United States. It is well settled that although a state may confer a privilege, it may not, in doing so, attach to its grant a condition depriving the grantee of a constitutional right.

The question was directly presented in the case of *Frost v. Commission*, 271 U. S. 583, 70 L. ed 1101. In that case there was under review an act of the state of California regulating the transportation over public highways of automobiles, trucks, etc., by the Railroad Commission. The act provided that a license and certificate of public convenience should be obtained before any truck should be so operated. The plaintiff in error was

transporting property in interstate commerce under a single priavte contract for stipulated compensation. Under the act he was unable to secure the certificate except upon becoming a public carrier. Suit was brought to enjoin the enforcement of the act, and the view was presented that the state had the right, in the exercise of its police power, to regulate the use of public highways, and in permitting the plaintiff in error to do so it was conferring a privilege to which it could attach any condition it saw fit. The court held that the condition was void, using the following language:

> "That, consistently with the due process clause of the 14th amendment, a private carrier cannot be converted against his will into a common carrier, by mere legislative command, is a rule not open to doubt and is not brought into question here. It was expressly so decided in *Michigan Public Utilities Commission v. Duke,* 266 U. S. 570, 60 L. ed. 445, 36 A. L. R. 1105, 45 Sup. Ct. Rep. 191. See also *Hissen v. Guran,* 112 Ohio St. 59, 146 N. E. 808; *State Ex Rel Public Utilities Commission v. Nelson,* 65 Utah, 457, 42 L. R. A. 849, 238 Pac. 237. The naked question which we have to determine therefore, is whether the state may bring about the same results by imposing the unconstitutional requirement as a condition precedent to the enjoyment of a privilege, which, without so deciding, we shall assume to be within the power of the state altogether to withhold if it sees fit to do so. Upon the answer to these questions, the constitutionality of the statute now under review will depend.
>
> "There is involved in the inquiry not a single power, but two distinct powers. One of these—the power to prohibit the use of the public highways in proper cases—the state possesses; and the other—the power to compel a private carrier to assume against his will the duties and burdens of a common carrier—the state does not possess. It is clear that

any attempt to exert the latter, separately and substantively, must fall before the paramount authority of the constitution. May it stand in the conditional form in which it is here made? If so, constitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect but no less effective process of requiring a surrender, which, though, in form voluntary, in fact lacks none of the elements of compulsion. Having regard to form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition, which the carrier is free to accept or reject. In reality, the carrier is given no choice, except a choice between the rock and the whirlpool—an option to forego a privilege which may be vital to his livelihood, or to submit to a requirement which may constitute an intolerable burden.

"It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition, that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditons which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties imbedded in the constitution of the United States may thus be manipulated out of existence.

"The prior decisions of this sort amply justify this conclusion. In *Paul v. Virginia,* 8 Wall. 168, 19 L. ed. 357, the rule was stated to be that the state, having the power to exclude foreign corporations from its limits, may admit them upon such terms and conditions as the state may think proper to impose. But, in *Home Ins. Co. v. Morse,* 20 Wall. 445, 22 L. ed. 365, it was said that this sweeping language must be understood with reference to the language of that case, and that it could not be extended to include conditions repugnant to the constitution and laws of the United States. In *Barron v. Burnside,* 121 U. S. 186, 30 L. ed. 915, 1 Inters. Com. Rep. 295, 7 Sup. Ct. Rep. 931, this limitation was expressly reaffirmed. Mr. Justice Blatchford, speaking for the court, said, page 200: 'The question as to the right of a state to impose upon a corporation engaged in interstate commerce the duty of obtaining a permit from the state, as a condition of its right to carry on such commerce, is a question which it is not necessary to decide in this case. In all the cases in which this court has considered the subject of the granting by a state to a foreign corporation of its consent to the transaction of business in the state, it has uniformly asserted that no conditions can be imposed by the state which are repugnant to the constitution and laws of the United States. *Lafayette Ins. Co. v. French,* 18 How. 404, 15 L. ed. 451; *Ducat v. Chicago,* 10 Wall. 410, 19 L. ed. 972, *Home Ins. Co. v. Morse,* 20 Wall. 445, 22 L. ed. 365; *Sinclair v. Cox.* 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354, *Fire Ass'n of Phil. v. N. Y.* 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. Rep. 108.'

"In *Southern Pac. Co. v. Denton,* 146 U. S. 202, 36 L. ed. 943, 13 Sup. Ct. Rep. 44, there was under consideration a Texas statute requiring a corporation desiring to do business in the state to agree that

it would not remove any suit from a court of the state into the circuit Court of the United States. This court held the statute invalid, saying:

" 'But that statute, requiring the corporation, as a condition precedent to obtaining a permit to do business within the state, to surrender a right and privilege secured to it by the constitution and laws of the United States, was unconstitutional and void, and could give no validity or effect to any agreement or action of the corporation in obedience to its provision.'

"After the Denton case, came *Security Mutual Life Ins. Co. v. Prewitt,* 202 U. S. 246, 50 L. ed. 1013, 26 Sup. Ct. Rep. 619, 6 Ann. Cas. 317. That decision purported to follow the case of *Doyle v. Continental Ins. Co.* 94 U. S. 535, 24 L. ed. 148, and to differentiate *Barron v. Burnside,* supra; and it was thought to have materially modified the rule laid down in the Morse, Burnside and Denton cases. But, however, this may be, both the Prewitt and Doyle cases have been quite recently overruled, and the views of the minority therein expressed declared to be now the law of this court. *Terral v. Burke Construction Co.,* 257 U. S. 529, 66 L. ed. 352, 21 A. L. R. 186, 42 Sup. Ct. Rep. 188. In the light of this declaration, these dissenting views become pertinent and controlling. In the Doyle case, Mr. Justice Bradley, speaking for the minority, said (Pages 543 and 544):

" 'Though a state may have the power, if it sees fit to subject its citizens to the inconvenience of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions upon their doing so. Total prohibition may produce suffering, and may manifest a spirit of unfriendliness toward sister states; but prohibition, except upon conditions derogatory to the jurisdicion and sovereignty of the

United States, is mischievous, and productive of hostilities and disloyalty to the general government. If a state is unwise enough to legislate the one, it has no constitutional power to legislate the other. * * * *

" 'The whole thing, however free from intentional disloyalty, is derogatory to that mutual comity and respect which ought to prevail between the state and general governments, and ought to meet the condemnation of the courts whenever brought within their proper cognizance.'

"In the Prewitt case, Mr. Justice Day dissenting, said, (Pages 267 and 269):

" 'In the opinion of the court in this case, the doctrine that a corporation connot be permitted to be deprived of its right to do business because of the assertion of a federal right is said not to be denied, because the right of a foreign corporation to do business in a state is not secured or guaranteed by the federal constitution. Conceding the soundness of this general proposition, it by no means follows that a foreign corporation may be excluded solely because it exercises a right secured by the federal constitution. For, conceding the right of a state to exclude foreign corporations, we must not overlook the limitation upon the right, now equally well settled in the jurisprudence of this court, that the right to do business cannot be made to depend upon the surrender of a right created and guaranteed by the federal constitution. If this were otherwise the state would be permitted to destroy a right created and protected by the federal constitution under the guise of exercising a privilege belonging to the state, and, as we have pointed out, the state might thus deprive every foreign corporation of the right to do business within its borders, except upon the condition that it strip itself of the protection given it by the federal constitution. * * *

" 'While we concede the right of a state to exclude foreign corporations from doing business within its borders for reasons not destructive of federal rights, we deny that the right can be made to depend upon the surrender of the protection of the federal constitution, which secures to alien citizens the right to resort to the courts of the United States.

" 'In the cases decided in this court subsequently to *Barron v. Burnside*, while the general proposition is affirmed that a state may prescribe conditions upon which a foreign corporation may do business within its borders, in no one of them is it asserted that the state may exclude or expel such corporations because they insist upon the exercise of a right created by the federal constitution. On the contrary, this court has repeatedly said that such right of exclusion was qualified by the superior right of all citizens to enjoy the protection of the federal constitution.'

"In *Western U. Telg. Co. v. Kansas*, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190, upon a full review of the prior decisions, the principle set forth in the foregoing quotations was again reaffirmed. That case involved the validity of a Kansas statute which provided that a corporation of another state, though engaged in interstate business, must, as a condition of doing local business, pay to the state certain graduated percentages of its capital stock. It was held that this requirement operated as a burden on the interstate business of the company, in violation of the commerce clause of the constitution, as well as a tax on its property beyond the limits of the state, in violation of the due process of law clause; that, thus, it was violative of the constitutional rights of the company; and that the right of the company to continue to do business in Kansas was

not and could not be affected by the condition. The general principle was again announced in the following words (Pages 47 and 48):

" 'The right of the Telegraph Company to continue the transaction of local business in Kansas could not be made to depend upon its submission to a condition prescribed by that state, which was hostile both to the letter and spirit of the constitution. The company was not bound, under any circumstances, to surrender its constitutional exemption from state taxation, direct or indirect, in respect to its interstate business, and its property outside of the state, any more than it would have been bound to surrender any other right secured by the National Constitution.'

"Since that decision, the same principle has been reiterated many times and never departed from. *Pullman Co. v. Kansas*, 216 U. S. 56, 63, 54 L. ed. 378, 384, 30 Sup. Ct. Rep. 232; *International Textbook Co. v. Pigg*, 217 U. S. 91, 54 L. ed. 678, 27 L. R. A. (N. S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103; *Herndon v. Chicago, R. I & P. Co.*, 218 U. S. 135, 158, 54 L. ed. 970, 978, 30 Sup. Ct. Rep. 633; *Harrison v. St. Louis &S. F. R. Co.*, 232 U. S. 318, 332, 58 L. ed. 621, 626, L. R. A. 1915F 1187, 34 Sup. Ct. Rep. 333; *Looney v. Crane Co.*, 245 U. S. 178, 187, 62 L. ed. 230, 235, 38 Sup. Ct. Rep. 85; *International Paper Co. v. Massachusetts*, 246 U. S. 135, 142, 143, 62 L. ed. 624, 629, 630, 38 Sup. Ct. Rep. 292, Ann. Cas. 1918C, 617; *Western U. Teleg. Co. v. Foster*, 247 U. S. 105, 114, 62 L. ed. 1006, 1016, 1 A. L. R. 1278, P. U. R. 1918D, 865, 38 Sup. Ct. Rep. 438; *Public Utility Comrs. v. Ynchausti & Co.*, 251 U. S. 401, 404, 64 L. ed. 327, 332, 40 Sup. Ct. Rep. 277; *Terral v. Burke Constr. Co.*, supra; *Missouri ex rel. Burnes Nat. Bank v. Duncan*, 265 U. S. 17, 24, 68 L. ed. 881, 882, 44 Sup. Ct. Rep. 427; *Fidelity & D. Co. v. Tafoya*, 270 U. S. 246, ante, 664, 46 Sup. Ct. Rep. 331 (decided March 15, 1926).

"And the principle, that a state is without power to impose an unconstitutional requirement as a condition for granting a privilege, is broader than the application thus far made of it. In *Western U. Telg. Co. v. Foster*, 247 U. S. 105, 62 L. ed. 1006, 1 A. L. R. 1278, P. U. R. 1918D, 865, 38 Sup. Ct. Rep. 438, two telegraph companies were engaged in transmitting the quotations of the New York Stock Exchange among the states. This was held to be interstate commerce, and an order of the public service commission of Massachusetts requiring the companies to remove a discrimination, was held to infringe their constitutional rights. One of the grounds upon which the order was defended was that it rested upon the power of the state over the streets which it was necessary for the telegraph to cross. That contention was answered broadly (page 114):

" 'But if we assume that the plaintiffs in error under their present charters could be excluded from the streets, the consequence would not follow. Acts generally lawful may become unlawful when done to accomplish an unlawful end (*United States v. Reading Co.*, 226 U. S. 325, 357, 57 L. ed. 243, 254, 33 Sup. Ct. Rep. 90), and a constitutional power cannot be used by way of condition to attain an unconstitutional result (*Western U. Teleg. Co. v. Kansas*, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; *Pullman Co. v. Kansas*, 216 U. S. 56, 54 L. ed. 378, 30 Sup. Ct. Rep. 232; *Sioux Remedy Co. v. Cope*, 235 U. S. 197, 203, 59 L. ed. 193, 197, 35 Sup. Ct. Rep. 57). The regulation in question is quite as great an interference as a tax of the kind that repeated decisions have held void. It cannot be justified under the somewhat ambiguous term of police powers.' "

And in almost the last expression of this court upon the subject, *Missouri ex rel Burnes Nat. Bank v. Duncan*, 265 U. S. 17, 68 L. ed. 881, 44 Sup. Ct. Rep. 427, the rule is none the less broadly but more succinctly stated to be (p. 24):

> " 'The states cannot use their most characteristic powers to reach unconstitutional results. *Western U. Telg. Co. v. Kansas*, supra; *Pullman Co. v. Kansas*, 216 U. S. 56, 54 L. ed. 378, 30 Sup. Ct. Rep. 232; *Western U. Teleg. Co. v. Foster*, supra.'
>
> " 'We hold that the act under review, as applied by the court below, violates the rights of plaintiffs in error as guaranteed by the due process clause of the 14th amendment; and that the privilege of using the public highways of California in the performance of their contract is not and cannot be affected by the unconstitutional condition imposed. *Western U. Teleg. Co. v. Kansas*, supra, p. 48 (54 L. ed. 374, 30 Sup. Ct. Rep. 190)."

The direct question was presented in the case of *Hanover Fire v. Carr*, 71 L. ed. 372, 272 U. S. 494. In that case a tax imposed upon a foreign fire insurance company was sought to be sustained on the theory that the same was a condition precedent to the right of the company to do business in the state; that the state might have excluded the company altogether, and could, therefore, attach any condition which it saw fit. The court used the following language: (page 379)

> "The general principle upon which the Supreme Court of Illinois holds the tax complained of herein to be valid is that the payment of it is part of the condition which the petitioner as a foreign insurance company is obliged to perform in order to maintain and retain its right to do business in the state. It was settled in the *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. ed. 274; *Paul v. Virginia*, 8 Wall. 168, 19 L.

ed. 357; *Ducat v. Chicago*, 10 Wall. 410, 19 L. ed. 972, and *Horn Silver Min. Co. v. New York*, 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403, that foreign corporations cannot do business in a state except by the consent of the state; that the state may exclude them arbitrarily or impose such conditions as it will upon their engaging in business within its jurisdiction. But there is a very important qualification to this power of the state, the recognition and enforcement of which are shown in a number of decisions of recent years. That qualification is that the state may not exact as a condition of the corporations engaging in business within its limits that its rights secured to it by the Constitution of the United States may be infringed. This is illustrated in respect to the breach of the commerce clause of the Constitution by the cases of *Sioux Remedy Co. v. Cope*, 235 U. S. 197, 203, 59 L. ed. 193, 197, 35 Sup. Ct. Rep. 57, and *Looney v. Crane Co.*, 245 U. S. 178, 188, 62 L. ed. 230, 235, 38 Sup. Ct. Rep. 85. It is illustrated in cases in which a provision of a state law revoking the license of a foreign corporation for exercising its constitutional right to remove suits brought against them from the state courts to the federal courts has been held void; (*Teral v. Burke Constr. Co.* 257 U. S. 529, 66 L. ed. 352, 21 A. L. R. 186, 42 Sup. Ct. Rep. 188): in cases in which the state has vainly attempted to subject foreign corporations to a payment of a tax which is a tax not only in the state but also on the property without the state, in violation of the due process clause of the 14th amendment (*Western U. Telg. Co. v. Kansas*, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; *St. Louis Cotton Compress Co. v. Arkansas*, 260 U. S. 346, 67 L. ed. 297, 43 Sup. Ct. Rep. 125); and finally, in cases of a class to which it is contended the present case belongs, where a tax or license law operates to deny to the foreign corporations the equal pro-

tection of the laws (*Southern R. Co. v. Greene*, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247; *Air-way Electric Appliance Corp. v. Day*, 266 U. S. 71, 69 L. ed. 169, 45 Sup. Ct. Rep. 12)."

So, in the present case, even if it be true that the state could condition the divesting of its own title, it cannot, thereby, place a direct burden upon interstate commerce. In other words, as in the present case, where the state has consented that every portion of the shrimp and oysters may pass into interstate commerce and has consented to the divesting of its title, completely, and contemplates that the commodities which form the subject of interstate commerce trade will, in due course, enter into interstate commerce, cannot, under the guise of subserving its natural resources, place a direct burden upon interstate commerce.

We especially d[illegible]t the attention of the court to the case of *Sioux Remedy Co. v. Cope*, 235 U. S. 197, 59 L. ed. 193. In that case the state of South Carolina had passed an act requiring foreign corporations before doing business in the state, to appoint an agent upon whom service of process could be had. This act was passed in furtherance of the alleged police power of the state so that the citizens of the state would have a remedy against the foreign corporation for breach of contract, fraud, etc. The state had the right, of course, to preclude the corporation doing business in the state. This court held, however, that it could not attach a condition thereto depriving the corporation of a constitutional right, using the following language:

"It may be conceded in a general way that a state may restrict the right of a foreign corporation to sue in its courts. *Bank of Augusta v. Earle*, 13 Pet. 519, 589-591, 10 L. ed. 274, 308, 309; *Anglo-American Provision Co. v. Davis Provisio nCo.*, 191 U. S. 373, 48 L. ed. 225, 24 Sup. Ct. Rep. 92. And in the same general way it may be conceded that a

state may restrict the right of such corporations to engage in business within its limits *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357; *Hooper v. California*, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep., 610, 15 Sup. Ct. Rep. 207. But the power so to deal with these subjects, like all other state powers, can only be exerted within the limitations which the Constitution of the United States places upon state action. *Missouri v. Lewis* (*Bowman v. Lewis*) 101 U. S. 22, 30, 25 L. ed. 989, 992; *Blake v. McClung*, 172 U. S. 239, 256, 43 L. ed. 432, 438, 19 Sup. Ct. Rep., 165; *Chambers v. Baltimore & O. R. Co.* 207 U. S. 142, 148, 52 L. ed. 143, 146, 28 Sup. Ct. Rep. 34; *Western U. Teleg. Co. v. Kansas*, supra, p. 33; *Southern R. Co. v. Greene*, 216 U. S. 400, 413, 54 L. ed. 536, 540, 30 Sup. Ct. Rep. 287, 19 Ann. Cas. 1247. One of these limitations is that before indicated, arising from the commerce clause, whose operation, as this court has said, is such that a corporation authorized by the state of its creation to engage in interstate commerce 'may not be prevented by another state from coming into its limits for all the legitimate purposes of such commerce.' *Western U. Teleg. Co. v. Kansas*, supra, p. 27. we think that when a corporation goes into a state other than that of its origin to collect, according to the usual or prevailing methods, the purchase price of merchandise which it has lawfully sold therein in interstate commerce, it is there for a legitimate purpose of such commerce, and that the state cannot, consistently with the limitation arising from the commerce clause, obstruct or hamper the attainment of that purpose. If it were otherwise, the purpose of the Constiution to secure and maintain the freedom of commerce by whomsoever conducted could be largely thwarted by the states and the commerce itself seriously crippled.

"We are thus brought to the question whether the particular conditions imposed by this statute can be sustained when applied to rights of action like that disclosed in the present case. Without doubt a foreign corporation seeking to enforce such a right in the courts of a state may be required to conform to the prevailing modes of proceeding in those courts, and to submit to the usual rules respecting costs, the giving of security therefor (see *Blake v. McClung*, 172 U. S. 239, 256, 43 L. ed. 432, 438, 19 Sup. Ct. Rep. 165), and the like. But incidents of this character commonly attending litigation may be put out of view, for it is with something quite different that we are here concerned. The conditions which the statute imposes are: First, that the company shall file in the office of the secretary of state an authenticated copy of its charter or articles of incorporation; second, that it shall appoint a resident agent upon whom process may be served in any action against it, and shall file a copy of such appointment in the office of the secretary of state and of the register of deeds of the county where the agent resides; and, third, that it shall pay the fees incident to filing and recording these instruments, approximating $25.00 It will be perceived that these are the conditions upon which many of the states permit foreign corporations to engage in business within their limits when no constitutional limitation is involved; that is, when the character of the business is that the state is free to exclude such corporations or to admit them upon terms acceptable to it. But here the conditions are sought to be applied in a different way and to a different situation falling within the reach of the commerce clause. Out of this arises the question of their validity. We think the mere statement of the conditions shows that they have no natural or reasonable relation to the right to sue which they are intended to restrict. They have no bearing upon the merits or any question of procedure or costs, are not directed against any

abusive use of judicial process, and are plainly onerous. The second one, respecting the appointment of a resident agent upon whom process may be served, is particularly burdensome, because, as the supreme court of the state has said, it requires the corporation to subject itself to the jurisdiction of the courts of the state in general as a prerequisite to suing in any of them; that is to say it withholds the right to sue even in a simple instance until the corporation renders itself amenable to suit in all the courts of the state by whosoever chooses to sue it there. If one state can impose such a condition others can, and in that way corporations engaged in interstate commerce can be subjected to great embarrassment and serious hazards in the enforcement of contractual rights directly arising out of and connected with such commerce. As applied to such rights we think the conditions are unreasonable and burdensome, and therefore in conflict with the commerce clause.

"These views require that the judgment be reversed and the cause remanded for further proceedings not inconsistent with this opinion."

The legislative enactments under review bear no relation to conservation of resources. Those permitted to fish are invited upon obtaining a license to catch all the shrimp within their capacity during the open season, and the same is true of the oysters. Those who take the tail meat off of the shrimp and the shell off of the oysters may ship them out without reservation or restriction; those who convert the hulls and heads of shrimp into shrimp bran, or utilize the shells of oysters for chicken feed or road building material, may ship the entire material out of the state without restriction or reservation; nothing is required to be kept in the state. The situation may be summed up as follows:

(a) Residents and corporations, the latter operating drying plants, within the state may take shrimp from the waters and oysters from the reefs wihout reservation or restriction. Section 4, Shrimp Act; Section 2, Oyster Act.

(b) They can without any kind if limitation pack or dry the shrimp when caught, can the oysters when taken from the reefs. Section 4, Shrimp Act; Section 2, Oyster Act.

(c) Within the state the shrimp or oysters may be sold to any person, firm or corporation. Section 13, Shrimp Act; Section 4, Oyster Act.

(d) Shrimp or oysters may be purchased by any firm or corporation from persons who catch the same, or from persons who have purchased the same from some corporation or persons who have caught them. Section 13, Shrimp Act; Section 4, Oyster Act.

(e) After the shrimp are hulled in Louisiana, and the shells taken off of the oysters, the meat of the shrimp or the shelled oysters may be shipped out of the state without restriction or reservation.

(f) After the hulls of the shrimp and the shells of the oysters are manufactured into the required by-product in Louisiana every particle thereof may be shipped in interstate commerce.

The whole arrangement is set up in contemplation of every part of the shrimp and the oysters, either in the raw or the manufactured form, passing out of the state into interstate commerce in a world market in competition with similar plants in the United States and foreign countries.

Interstate commerce comprises not only the shipment of property from one state to another, but also protects the dealings, negotiations and contracts in respect thereto.

In the case of *Dahnke Milling Co. v. Bondurant*, 257 U. S. 262, 66 L. ed. 239, the plaintiff went into the State of Kentucky and made a contract with a citizen of

the latter state, whereby the citizen of Kentucky was to prepare and deliver, f. o. b. cars in Kentucky, certain grain to be shipped to the plaintiff in the State of Tennessee. There was a breach of the contract, and the plaintiff, the purchaser, filed suit for damages. The state court held that the failure of the plaintiff corporation to file a copy of its charter, as required by the Kentucky statutes, rendered the contract unenforceable. The Supreme Court of the United States held that the act of buying in the State of Kentucky was a step in interstate commerce and the state statute was void, using the folfolwing language:

> "Such commerce is not confined to transportation from one state to another, but comprehends all commercial intercourse between different states and all the component parts of that intercourse. Where goods in one state are transported into another for purposes of sale, the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination, and while they are in the original packages. *Brown v. Maryland,* 12 Wheat. 419, 446, 6 L. ed. 678, 688, 689; *American Steel & Wire Co. v. Speed,* 192 U. S. 500, 519, 48 L. ed. 538, 546, 24 Sup. Ct. Rep. 365. On the same principal, where goods are purchased in one state for transportation to another, the commerce includes the purchase quite as much as it does the transportation. *American Exp. Co. v. Iowa,* 196 U. S. 133, 143, 49 L. ed. 417, 422, 25 Sup. Ct. Rep. 182. This has been recognized in many decisions construing the commerce clause. Thus, it was said in *Walton v. Missouri,* 91 U. S. 275, 23 L. ed. 347, 349: 'Commerce is a term of the largest import. It comprehends intercourse for the purpose of trade in any and all its forms, including the transportation, purchase, sale and exchange of commodities.' In *Kidd v. Pearson,* 128 U. S. 1, 20, 32 L. ed. 346, 350, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6, it was tersely said: 'Buying and selling and the trans-

portation incidental thereto constitute commerce.' In *U. S. v. E. C. Knight Co.*, 156 U. S. 1, 13, 39 L. ed. 325, 329, 15 Sup. Ct. Rep. 249, 'Contracts to buy, sell or exchange goods to be transported among the several states' were declared 'part of interstate trade of commerce.' And in *Addyston Pipe & Steel Co. v. United States* 174 U. S. 211, 241, 44 L. ed. 136, 147, 20 Sup. Ct. Rep. 95, the court referred to the prior decisions as establishing that 'interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different states, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, and also, the purchase, sale and exchange of commodities. In no case has the court made any distinction between buying and selling, or between buying for transportation to another state and transporting for sale in another state. Quite to the contrary, the import of the decisions has been that if the transportation was incidental to buying or selling, it was not material whether it came first or last.''

The direct question was presented in the case of *Lemke v. Farmers' Grain Co.*, 258 U. S. 50, 66 L. ed. 458. In that case, the defendants in error were operating a series of grain elevators in the State of North Dakota, where grain was purchased with a view to being resold. A small portion thereof was sold in the State of North Dakota, but the greater portion thereof was sold and shipped out of the State. The state of North Dakota passed an act regulating the operation of the state elevators. An injunction was obtained in the United States Court on the ground that the act was an interference with interstate commerce. The Federal Court in North Dakota so held, and the Supreme Court of the United States sustaining the decree, used the following language:

"That such course of dealing constitutes interstate commerce, there can be no question. The court has so held in many cases, and we have had occasion to discuss and decide the nature of such commerce in a case closely analogous in its facts, and altogether so in principle. *Dahnke v. Walker Mill Co. v. Bondurant*, decided December 12th, 1921, (257 U. S. 282, ante, 239, 43 Sup. Ct. Rep. 106.) In that case the facts disclose that a company organized in Tennessee and carrying on business there, went into the State of Kentucky, and, through an agent there, bought wheat for shipment to the company's mill in Tennessee. The state court held that he transaction was merely a purchase of wheat in Kentucky, and made the Tennessee Company amenable to the regulatory statutes of the state. The court rejected the conclusion of the state court, and held that the buying, no less than the selling, was a part of interstate commerce, committed to national control by the Federal Constitution. Applying the principal of that decision, and the previous decisions in this court, cited in the opinion, the complainant's course of dealing in the buying of grain, which it purchased and sold under the circumstances as herein disclosed, was interstate commerce. Being such, the state could not regulate the business by a statute which had the effect of control and burden interstate commerce."

"Nor is this conclusion opposed by cases decided in this court and relied upon by appellants, in which we have had occasion to define the line between a definition of interstate commerce where the right of state taxation was involved, or manufacure or commerce of an interstate character was the subject of consideration. In those cases we have defined the beginning of interstate commerce as that time when goods begin their interstate journey by delivery to a carrier or otherwise, thus passing beyond state authority into the domain of Federal

control. Cases of that type are not in conflict with principles recognized as controlling here. None of them indicates, much less decides, that interstate commerce does not include the buying and selling of products for shipment beyond state lines. It is true, as appellants contend, that after the wheat was delivered at complainant's elevator, or loaded on the cars for shipment, it might have been diverted to a local market or sent to a local mill. But such was not the course of business. The testimony shows that practically all the wheat purchased by the complainant was for shipment to and sale in the Minneapolis market. That was the course of business, and fixed and determined the interstate character of the transactions. *Swift & Co. v. United States,* 196 U. S. 376, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; *Eureka Pipe Line Co. v. Hallahan,* decided by this court December 12, 1921, (257 U. S. 265, ante, 227, 42 Sup. Ct. Rep. 101); and *United States Fuel Co. v. Hallahan,* decided the same day, (257 U. S. 277, ante, 234, 42 Sup. Ct. Rep. 105)."

The case of *Stafford v. Wallace,* 258 U. S. 495, 66 L. ed. 735, was a case which involved the validity of the Packers & Stockyards Act of Congress, approved August 15, 1921. The act provided for the supervision by a federal authority of the business of the commission men and of live stock dealers in the great stockyards of the country. It was contended, among other things, in that case that the act was unconstitutional, because a portion of the business and transactions transacted at the stockyards was intrastate, and that such business and transactions Congress could not regulate. The Supreme Court of the United States in passing on the question reviewed the case of *Swift & Co. v. United States,* 196 U.S. 375, 49 L. ed. 518, and used the following language, sustaining the constitutionality of the act:

"The Swift case presented in this court the sufficiency of a bill in equity brought against substantially the same packing firms as those against whom

this legislation is chiefly directed, charging them as a combination of a dominant proportion of the dealers in fresh meat throughout the United States not to bid against each other in the live stock markets of the different states, to bid upon prices for a few days in order to induce the cattlemen to send their stock to the stockyards, to fix prices at which they would sell, and to that end to restrict shipments of meat when necessary to establish a uniform credit to dealers, and to keep a black list, to make uniform and improper charges for cartage, and finally to get less than lawful rates from the railroads, to the exclusion of competitors, and all of this in a conspiracy and single connected scheme to monopolize the supply and distribution of fresh meats throughout the United States. In holding the bill good, this court said, (p. 396): (The scheme as a whole seems to us to be within the reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body, and, for all that we can say, to accomplish it. * * * It is suggested that the several acts charged are lawful, and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful. *Aikens v. Wisconsin*, 195 U. S. 194, 206, 49 L. ed. 154, 260, 25 Sup. Ct. Rep. 3. The state gives this proceeding against combinations in restraint of commerce among the states and against attempts to monopolize the same. Intent is also essential to such a combination and is essential to such an attempt."

Again (p. 396 and 397): "Although the combination it alleges embraces restraint and monopoly of trade within a single state, its effect upon commerce among the states is not accidental, secondary, remote or merely probable. * * * There the subject matter is sales, and the very point of the combination is to restrain and monopolize commerce among the states in respect to such sales"

Again, (p. 398 and 399), in answer to the object that what was charged did not constitute a case involving commerce among the states, the court said:

> "Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stockyards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of the cattle is a part of and incident of such commerce. What we say is true, at least, of such a purchase, by residents in another state from that of the seller and of the cattle."

The application of the commerce clause of the Constitution in the Swift case was the result of the natural development of interstate commerce under modern conditions. It was the inevitable recognition of the great central fact that such streams of commerce from one part of the country to another, which are overflowing, are, in their very essence, the commerce among the states and with foreign nations which historically it was one of the chief purposes of the Constitution to bring under national protection and control. This court declined to defeat this purpose in respect to such a stream, and take it out of complete national regulation by a nice and technical inquiry into the non-interstate character of some of its necessary incidents and facilities when considered and without reference to their association with the movement of which thew were an essential and subordinate part.

The principles of the Swift case have become a fixed rule of this court in the construction and application of the commerce clause. Its latest expression on the subject is found in *Leake v. Farmers' Grain Co.* decided at

this term, February 27, 1922, (258 U. S. 50, ante, 458, 42 Sup. Ct. Rep. 244). In that case it was held on the authority of the Swift case, that the delivery and sale of wheat by farmers to local grain elevators in North Dakota, to be shipped to Minneapolis, when practically all the wheat purchased by such dealers was so shipped, and the price was fixed by that in Minneapolis market, less profit and freight, constituted a course of business and determined the interstate character of the transaction. Accordingly, a state statute which sought to regulate the price and profit of such sales, and was found to interfere with the free flow of interstate commerce, was declared invalid as a violation of the commerce clause. Similar conformation of the principle of the Swift case is to be found in *Dahnke, Walker Mill Co. v. Bondurant,* 257 U. S. 282, ante, 239, 42 Sup. Ct. Rep. 106 in *Eureka Pipe Line v. Hallahan,* 257 U. S. 277, ante 234, 42 Sup. Ct. Rep. 105, all decided December 12, 1921; in *Western U. Tel. Co. v. Foster,* 247 U. S. 105, 113, 62 L. ed. 1006, 1015; 1. L. R. A. 1278, P. U. R. 1918B, 865, 38 Sup, Ct. Rep. 438; in *United States v. Reading Co.* 226 U. S. 324, 367, 368, 57 L. ed. 243, 258, 33 Sup. Ct. Rep. 90; *Railroad Commission v. Worthington,* 225 U. S. 101, 108, 56 L. ed. 1004, 1008, 32 Sup. Ct. Rep. 653; *Lowe v. Lawler,* 208 U. S. 274, 301, 52 L. ed. 488, 502, 28 Sup Ct. Rep. 301, 13 Ann. Cas. 815."

The doctrine was examined in the case of *Flanagan v. Federal Coal Co.,* 267 U. S. 222, 69 L. ed. 583.

In the case of *Shafer, Attorney General of North Dakota, v Farmers' Grain Co.,* 268 U. S. 189, 69 L. ed 909, it appeared that after the decision of the Supreme Court of the United States in the case of *Lemke v. Farmers' Grain Co.* supra, the State of North Dakota passed a new act regulating elevators. The Supreme Court of the United States again held that the act was an interference with interstate commerce, using the following language:

"We think it plain that in subjecting the buying for interstate shipments to the conditions and measure of control just shown, the act directly interferes with and burdens interstate commerce, and is an attempt to prescribe by the state authorities rules under which an important part of such commerce shall be conducted. This no state can do consistently with the commerce clause.

"The defendants cite several cases as making for a different conclusion, but we do not so read them. In some the commerce clause was in no way involved, and those in which it was involved give no support to what is attempted in the act now before us. In *Munn v. Illinois*, 94 U. S. 113, 123, 135, 34 L. ed. 77, 83, 87, the question was whether as respects an elevator devoted to storing grain for hire, the state could regulate the storage charge where part of the grain reached the elevator, or was destined to leave it, through the channels of interstate commerce. The court held such a regulation admissible because of the public character of the elevator, and because interstate commerce was affected only incidentally and remotely. No restriction on buying or shipping was involved. In *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423, the court had before it a state statute. Much of which had been pronounced unconstitutional by the state court. In sustaining a provision which remained, the court said, p. 470: 'The statute puts no obstacle in the way of the purchase by the defendant company of grain in the state, or the shipment out of the state of such grain as it purchased.' Plainly, the case is not in point here. In *Merchants Exch. v. Missouri*, 248 U. S. 365, 63 L. ed. 300, 39 Sup. Ct. Rep. 114, the statute involved required that public weighers appointed for the purpose should do the weighing and issue weight certificates at elevators used for storing or transferring grain for hire, and prohibited any other per-

son from issuing weight certificates at an elevator where a public weigher was stationed. Objection was made to the prohibition on the ground that, as applied to grain received from or shipped to points without the state, it burdened interstate commerce. Of course, the objection was overruled, the statute being an admissible regulation of the business of conducting an elevator for hire, like the statute considered in *Munn v. Illinois*.

"The defendants make the contention that we should assume the existence of evils justifying the people of the state in adopting the act. The answer is that there can be no justification for the exercise of a power that is not possessed. If the evils suggested are real, the power of correction does not rest with North Dakota but with Congress, where the Constitution intends that it shall be exercised with impartial regard for the interests of the people of all the states that are affected."

Interstate commerce as applied to commercial transactions as in that of Taxation.

Coe v. Erroll, 116 U. S. 517, was a taxation case. In that case the plaintiff in error accumulated a lot of logs in the state of New Hampshire which he was intending to ship into the state of Maine to be manufactured and sold in interstate commerce. The logs had been placed upon the banks of a stream and were to be shipped whenever the water came up, which might be several months. The local authorities assessed the logs for taxation, and it was contended by the owner that because he intended at some indefinite future date to ship them into Maine where they were to be manufactured into lumber, and then sold in interstate commerce that the logs were free from taxation in the state of New Hampshire. It will be noted that the logs would not move in interstate commerce until two things were done: They must be floated down the river from the state of New Hampshire to the state of Maine, then undergo manufacture and prepara-

tion, after which they were to be offered for sale in interstate commerce. The real distinction lies, however, in the recognition of the principle that interstate commerce as applied to a given commodity when a question of taxation is presented, is not the same as applied to commodities under dissimilar circumstances. In other words, the Supreme Court of the United States is very much disposed to decide, and has decided many times, that when property comes to a full stop in a state, is kept there, and enjoys the protection of the laws of the state, that it becomes subject to taxation; that is to say, it must pay for the protection which it enjoys. We have recently had occasion to study that question in respect to tank cars brought into the state of Mississippi for the purpose of filling interstate orders, interstate contracts for oil, the car being unloaded on its arrival and immediately transmitted out of the state. In view of the fact that the shippers of such commodity ordinarily keeps an average number of cars within the state or always have some cars in the state, for such purpose, the Supreme Court of the United States holds that they are taxable, although such cars are instruments of interstate commerce. See case of *Union Refrigerator Transit Co. v. Lynch*, 177 U. S. 149, 44 L. ed. 708; *American Refrigerator Co. v Hall*, 174 U. S. 70, 43 L. ed. 899.

In the case of *Lemke v. Farmers' Grain Co.* 258 U. S. 50, 66 L. ed. 458, the supreme court of the United States definitely announced that in determining as to whether or not a given commodity was engaged in interstate commerce a somewhat different rule was applied in taxation cases. The court said:

> "Nor is this conclusion opposed by cases decided in this court and relied upon by appellants, in which we have had occasion to define the line between state and federal authority under facts presented which require a definition of interstate commerce where the right of taxation was involved, or manufacture,

or commerce of an intrastate character was the subject of consideration. In those cases we have defined the beginning of interstate commerce as that time when goods begin their interstate journey by delivery to a carrier, or otherwise, thus passing beyond authority into the domain of federal control. Cases of that type are not in conflict with principles recognized as controlling here."

Other cases directly in point are the following: *Robbins v. Taxing District*, 120 U. S. 489, 30 L. ed. 694; *Ozark Pipe Line Co. v. Lanier*, 266 U. S. 555, 69 L. ed. 439; *Thornton v. United States* 271 U. S. 414, 70 L. ed. 1013; *Davis v. Farmers' Cooperative Equity Co.*, 262 U. S. 66, 67 L. ed. 996; *Spalding & Brothers v. Edwards*, 262 U. S. 66, 67 L. ed. 865; *Hammer v. Dagenhart*, 247 U. S. 251, 62 L. ed. 1101; *United States v. Hill*, 248 U. S. 420, 67 L. ed. 337; *Blumingstock Bros. v. Curtis Pub. Co.* 252 U. S. 436, 64 L. ed. 649; *Weeks v. United States*, 245 U. S. 618, 62 L. ed. 513.

In the case of *Brooks v. U. S.* 267 U. S. 432, 69 L. ed. 699, this court held that the driving of a stolen automobile from one state into another was interstate commerce.

In the case of *Fulton v. U. S.* 271 U. S. 414, 70 L. ed. 1013, the court held that the driving of cattle from one state into another was interstate commerce.

In the case of *Real Silk Hosiery Mills v. Portland*, 268 U. S. 325, 69 L. ed. 982, this court held that a state statute requiring persons going from place to place soliciting orders for merchandise to be shipped from out the state violated the commerce clause of the constitution. The court used the following language:

"By a bill filed in the United States District Court for Oregon appellant challenged the ordinance and asked that its enforcement be restrained upon the ground, among others, that it interferes with

and burdens interstate commerce and is repugnant to article 1, sec. 8, Federal Constitution. The trial court upheld the enactment and sustained a motion to dismiss the bill. This was affirmed by the circuit court of appeals, 297 Fed. 897.

"Considering former opinions of this court we cannot doubt that the ordinance materially burdens interstate commerce and conflicts with the commerce clause. *Robbins v. Taxing Dist.* 120 U. S. 489, 497, 30 L. ed. 694, 697, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Brennan v. Titusville,* 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; *Rearick v. Pennsylvania,* 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159; *Crenshaw v. Arkansas,* 227 U. S. 389, 57 L. ed. 565, 33 Sup. Ct. Rep. 294; *Texas Transport & Terminal Co. v. New Orleans,* 264 U. S. 150, 68 L. ed. 611, 34 A. L. R. 907, 44 Sup. Ct. Rep. 242; *Alpha Portland Cement Co. v. Massachusetts,* 267 U. S. 203, ante, 916, 45 Sup. Ct. Rep. 477 (May 4, 1925).

"The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce.' Manifestly, no license fee could have been required of appellant's solicitors if they had traveled at its expense and received their compensation by direct remittances from it. And we are unable to see that the burden on interstate commerce is different or less because they are paid through retention of advance partial payments made under definite contracts negotiated by them. Nor can we accept the theory that an expressed purpose to prevent possible frauds is enough to justify legislation which really interferes with the free flow of legitimate interstate commerce. See *Shafer v. Farmers Grain Co.,* 268 U. S. 189, ante, 909, 49 Sup. Ct. Rep. 481 (May 4, 1925)."

In *Federal Trade Commission v. Paper Trade Association*, 273 U. S. 52, 71 L. ed. 534, the court used the following language:

"Paragraph (c) applies only to mill shipments from one state to another. For the consummation of a transaction involving such a shipment, two contracts are made. The first is for sale and delivery by wholesaler to retailer in the same state. The seller is free to have delivery made from any source within or without the state. The price charged is that fixed by the local association. The other contract is between the wholesaler and the manufacturer in different states. There is no contractual relation between the manufacturer and retailer. By the shipment of the paper from a mill outside the state to or for the retailer, the wholesaler's part of the first contract is performed. The question is whether the sale by the wholesaler to the retailer in the same state is a part of interstate commerce where, subsequently at the instance of the seller and to perform his part of the contract, the paper is shipped from a mill in anoher state to or for the retailer. 'Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business.' *Swift & Co. v. United States*, 196 U. S. 375, 398, 49 L. ed. 518, 525, 25 Sup. Ct. Rep. 276. And what is or not interstate commerce is to be determined upon a broad consideration of the substance of the whole transaction. *Dozier v. Alabama*, 218 U. S. 124, 128, 54 L. ed. 965, 967, 28 L. R. A. (N. S.) 264, 30 Sup. Ct. Rep. 649. Such commerce is not confined to transportation, but comprehends all commercial intercourse between different states and all the component parts of that intercourse. And it includes the buying and selling of commodities for shipment from one state to another. *Dahnke-Walker Mill co. v. Bondurant*, 257 U. S. 282, 290, 66 L. ed. 239, 243, 42 Sup. Ct. Rep. 106; *Lemke v. Farmers Grain Co.*, 258 U. S. 50, 66 L. ed. 458, 462, 42 Sup. Ct.

Rep. 244. The absence of contractual relation between the manufacturer and retailer does not matter. The sale by the wholesaler to the retailer is the initial step in the business completed by the interstate transportation and delivery of the paper. Presumably the seller has then determined whether his source of supply is a mill within or one without the state. If the contract of sale provided for shipment to the purchaser from a mill outside the state, then undoubtedly it would be an essential part of commerce among the states. *Sonneborn Bros. v. Cureton* (*Sonneborn Bros. v. Keeling*), 262 U. S. 506, 515, 67 L. ed. 1095, 1100, 43 Sup. Ct. Rep. 643. Clearly the absence of such a provision does not affect the substance of the matter when in fact such a shipment was contemplated and made. Cf. *Dozier v. Alabama*, supra; *Western U. Telg. Co. v. Foster*, 247 U. S. 105, 113, 62 L. ed. 1006, 1015, 1 A. L. R. 1278, P. U. R. 1918D, 865, 38 Sup. Ct. Rep. 438; *Lemke v. Farmers Grain Co.*, supra, 55 (66 L. ed. 462, 42 Sup. Ct. Rep. 244). The election of the seller to have the shipment made from a mill outside the state makes the transaction one in commerce among the states. And on these facts the sale by jobber to retailer is a part of that commerce."

In *International Textbook Co. v. Pigg*, 217 U. S. 91, 54 L. ed. 678, the court used the following language:

"The same thought was expresed in *Western U. Tel. Co. v. Pendleton*, 122 U. S. 347, 356, 30 L. ed. 1187, 1188, 1 Inters. Com. Rep. 306, 307, 7 Sup. Ct. Rep. 1126, 1127, where the court said: 'Other commerce deals only with persons, or with visible and tangible things. But the telegraph transports nothing visible and tangible; it carries only *ideas, wishes, orders,* and *intelligence.*' It was said in the circuit court of appeals for the eighth circuit, speaking by Judge Sanborn in *Butler Bros. Shoe Co. v. United States Rubber Co.*, 84 C. C. A. 167, 183, 156 Fed 1, 17, that

'all interstate commerce is not sales of goods. Importation into one state from another is the indispensable element, the test, of interstate commerce; and every negotiation, contract, trade, and dealing between citizens of different states, which contemplates and causes such importation, whether it be of goods, persons or *information*, is a transaction of interstate commerce.' "

We respectfully submit that the contracts involved in these cases, whereby the complainant, Foster-Fountain Packing Co., obligated itself to transport from Louisiana into the State of Mississippi, to the Sea Food Company of Mississippi, shrimp, and the contract whereby the Sea Food Company of Louisiana, in like manner, contracted to transport oysters to L. O. Johnson, Jr., are each contracts in interstate commerce, are protected by the commerce clause, and the acts are void as applied thereto as an interference with interstate commerce.

The case of *Binderup v. Pathe Exchange*, 263 U. S. 291, 68 L. ed. 308, is directly in point. In that case the complainant was engaged in the business of distributing moving picture films to various portions of the United States for use in moving picture shows. He would purchase these films from corporations belonging to what is known as the Pathe Exchange. The members entered into a combination to ruin the business of the plaintiff in error, and undertook to make same effective by agreeing one with the other that they would have no further business relations with the plaintiff in error. Deeming their combination in violation of the anti-trust act, he filed suit for damage, and was met in the lower court with the point that because the films forming the subject-matter of his business were not actually moving in interstate commerce, the anti-trust act of Congress was not involved. This court again announced the rule that interstate commerce included not only the transportation of property, but negotiations and contracts incidental thereto. The court used the following language:

"The film contracts were between residents of different states, and contemplated the leasing by one to the other of a commodity manufactured in one state and transported and to be transported to and used in another. The business of the distributors, of which the arrangement with the exhibitor here was an incident, was clearly interstate. It consisted of manufacturing the commodity in one state, finding the customer for it in other states, making contracts of lease with them, and transporting the commodityleased from the state of manufacture into the state of the lessees. If the commodity were consigned directly to the lessees, the interstate character of the commerce throughout would not be disputed. Does the circumstance that, in the course of the process, the commodity is consigned to a local agency of the distributors, to be by that agency held until delivery to the lessees in the same state, put an end to the interstate character of the transaction and transform it into one purely intrastate? We think not. The intermediate delivery to the agency did not end, and was not intended to end, the movement of the commodity. It was merely halted as a convenient step in the process of getting it to its final destination. The general rule is that where transportation has acquired an interstate character, 'it continues at least until the load reaches the point where the parties originally intended that the movement should finally end.' *Illinois C. R. Co. v. De Fuentes,* 236 U. S. 157, 163, 59 L. ed. 517, 519; P. U. R. 1915A, 840, 35 Sup. Ct. Rep. 275. And see *Western U. Telg. Co. v. Foster,* 247 U. S. 105, 113, 62 L. ed. 1006, 1015, 1 A. L. R. 1278, P. U. R. 1918D, 865, 38 Sup. Ct. Rep. 438; *Western Oil Ref. Co. v. Lipscomb,* 244 U. S. 346, 349, 61 L. ed. 1181, 1183, 37 Sup. Ct. Rep. 623.

"In *Swift & Co. v. U. S.,* 196 U. S. 375, 398, 49 L. ed. 518, 525, 25 Sup. Ct. Rep. 276, it was held that where cattle were sent for sale from a place

in one state, with the expectation that the transit would end after purchase in another state, the only interruption being that necessary to rind a purchaser at the stockyards, and this was a typical, constantly recurring course, the whole transaction was one in interstate commerce and the purchase a part and incident of it. It further appeared in that case that Swift & Co. were also engaged in shipping fresh meats to their respective agents at the principal markets in other cities, for sale by such agents in those markets to dealers and consumers; and these sales were held to be part of the interstate transaction upon the ground 'that the same things which are sent to agents are sold by them and * * * some, at least, of the sales, are of the original packages. Moreover, the sales are by persons in one state to persons in another.' In the same case in the court below (122 Fed. 529, 533), upon this branch of the case, it is said:

"'I think the same is true of meat sent to agents, and sold from their stores. The transaction, in such case, in reality, is between the purchaser and the agents' principal. The agents represent the principal at the place where the exchange takes place; but the transaction, as a commercial entity, includes the principal, and includes him as dealing from his place of business.'

"The most recent expression of this court is in *Stafford v. Wallace*, 258 U. S. 459, 516, 66 L. ed. 735, 741, 23 A. L. R. 229, 42 Sup. Ct. Rep. 397, where after describing the process by which the live stock are transported to the stockyards, and thence to the purchasers, it is said: 'Such transactions cannot be separated from the movement to which they contribute, and necessarily take on its character. The commission men are essential in making the sales, without which the flow of current would be obstructed, and this, whether they are made to packers or

dealers. The dealers are essential to the sales to the stock farmers and feeders. The sales are not, in this aspect, merely local transactions. They create a local change of title, it is true, but they do not stop the flow; they merely change the private interest in the subject of the current not interferring with but, on the contrary, being indispensable to its continuity.' The transactions here are essentially the same as those involved in the foregoing cases, substituting the word 'film' for the word 'livestock,' or 'cattle' or 'meat.' Whatever difference exists is of degree, and not in character.

"The cases cited by defendants in error upholding state taxation as not constituting an interference with interstate commerce, are of little value to the inquiry here. It does not follow that, because a thing is subject to state taxation, it is also immune Federal regulations under the commerce clause. *Stafford v. Wallace*, supra, pp. 525-527; *Addyston Pipe & Steel Co. v. U. S.* 175 U. S. 211, 245, 44 L. ed. 136, 149, 20 Sup. Ct. Rep. 96.

"The distributors according to the allegations of the complaint, control the distribution of all films in the United States, and the exhibitor could not procure them from others. The direct result of the alleged conspiracy and combination not to sell to the exhibitor, therefore, was to put an end to his participation in that business. Interstate commerce includes the interstate purchase, sale, lease, and exchange of commodities, and any combination or conspiracy which unreasonably restrains such purchase, sale, lease, or exchange is within the terms of the anti-trust act, denouncing as illegal every contract, combination, or conspiracy 'in restraint in trade or commerce among the several states.' The allegation of the complaint is that the exhibitor has been procuring films from some of the distributors, but has refused to buy from others, who thereupon in-

duced the former to cease dealing with him, and that all then combined and conspired, in restraint of interstate trade and commerce, to prevent him from carrying on his business; that they have ever since refused to furnish him with film service, and have caused unexpired contracts which he held with some of them to be illegally cancelled. It is difficult to imagine how interstate trade could be more effectively restrained than by suppressing it, and that, in effect, so far as the exhibitor is concerned, is what the distributors in combination are charged with doing and intending to do. It is doubtless true that each of these distributors, acting separately, could have refused to furnish films to the exhibitor without becoming amenable to the provisions of the act; but here it is alleged that they combined and conspired together to prevent him from leasing from any of them. The illegality consists, not in the separate action of each, but in the conspiracy and combination of all, to prevent any of them from dealing with the exhibitor. See *U. S. v. Schrader's Son*, 252 U. S. 85, 99, 64 L. ed. 471, 475, 40 Sup. Ct. Rep. 251; *Bobbs-Merrill Co. v. Straus*, 139 Fed. 155, 191. The contracts with these distributors contemplated and provided for transactions in interstate commerce. The business which was done under the leasing, transportation, and delivery of films—was interstate commerce. The alleged purpose and direct effect of this combination and conspiracy were to put an end to these contracts and future business of the same character, and 'restrict, in that regard, the liberty of a trader to engage in business.' (*Loew v. Lawlor*, 208 U. S. 274, 293, 52 L. ed. 488, 496, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815), and, as a necessary corollary, to restrain interstate trade and commerce, in violation of the anti-trust act."

We desire to lay emphasis on the language used in that case as to what involved interference with interstate commerce. Your Honors used the following language:

"It is difficult to imagine how interstate trade could be more effectively restrained than by suppressing it, and that, in effect, so far as the exhibitor is concerned, is what the distributors in combination are charged with doing and intending to do."

THIS COURT WILL INVESTIGATE THE RECORD AND DETERMINE FOR ITSELF AS TO WHETHER OR NOT APPELLANTS HAVE BEEN DEPRIVED OF A CONSTITUTIONAL RIGHT.

In the case of *Interstate Amusement Company v. Albert*, 239 U. S. 560, 60 L. ed. 439, the court used the following language:

"It is settled that such findings of fact, in ordinary cases than those arising under the 'contract clause' of the constitution, are binding upon this court. *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 97, 53 L. ed. 417, 424, 29 Sup. Ct. Rep. 220; *Rankin v. Emigh*, 218 U. S. 27, 32, 54 L. ed. 915, 920, 30 Sup. Ct. Rep. 672; *Mledreich v. Lauenstein*, 232 U. S. 236, 243, 58 L. ed. 584, 389, 34 Sup. Ct. Rep. 309. But the rule has its exceptions, as, for instance, where there is ground for the insistence that a federal right has been denied as the result of a finding that is without support in the evidence. *Southern P. Co. v. Schuyler*, 227 U. S. 601, 611, 57 L. ed. 662, 669, 43 L. R. A. (N. S.) 901, 33 Sup. Ct. Rep. 277; *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 259, 58 L. ed. 591, 595, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159; *Carlson v. Washington*, 234 U. S. 103, 106, 58 L. ed. 1237, 1238, 34 Sup. Ct. Rep. 717."

In the case of *Truax v. Corrigan*, 257 U. S. 312, 66 L ed. 254, the court used the following language:

"The facts alleged are admitted by the demurrer, and, in determining their legal effect as a deprivation of plaintiffs' legal rights under the 14th

Amendment, we are at as full liberty to consider them as was the state supreme court. *Mackay v. Dillon*, 4 How. 431, 11 L. ed. 1046; *Dower v. Richards*, 151 U. S. 658, 667, 38 L. ed. 308, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704. Nor does the court's declaration that the statute is a rule of evidence bind us in such an investigation. *Bailey v. Alabama*, 219 U. S. 219, 238, 55 L. ed. 191, 200, 31 Sup. Ct. Rep. 145; *Chicago M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Mugler v. Kansas*, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; *Corn Products Ref. Co. v. Eddy*, 249 U. S. 427, 432, 63 L. ed. 687, 693, 39 Sup. Ct. Rep. 325. In cases brought to this court from state courts for review, on the ground that a Federal right set up in the state court has been wrongly denied, and in which the state court has put its decision on a finding that the asserted Federal right has no basis in point of fact, or has been waived or lost, this court, as an incident of its power to determine whether a Federal right has been wrongly denied, may go behind the finding to see whether it is without substantial support. If the rule were otherwise, it almost always would be within the power of a state court practically to present a review here. *Kansas City Southern R. C. v. H. Albers Commission Co.*, 223 U. S. 573, 591, 593, 56 L. ed. 556, 565, 32 Sup. Ct. Rep. 316; *Cedar Rapids Gaslight Co. v. Cedar Rapids*, 223 U. S. 655, 668, 669, 56 L. ed. 594, 604, 32 Sup. Ct. Rep. 389; *Southern P. Co. v. Schuyler*, 227 U. S. 601, 611, 57 L. ed. 662, 669, 43 L. R. A. (N. S.) 901, 33 Sup. Ct. Rep. 277. Another class of cases in which this court will review the finding of the court as to the facts is when the conclusion of law and findings of fact are so intermingled as to make it necessary, in order to pass upon the question, to analyze the facts. *Northern P. R. Co. v. North Dakota*, 236 U. S. 585, 593, 59 L. ed. 735, 740, L. R. A. 1917F, 1148 P. U. R.

1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1; *Jones Nat. Bank v. Yates,* 240 U. S. 541, 552, 553, 60 L. ed. 788, 797, 36 Sup. Ct. Rep. 429. In view of these decisions and the grounds upon which they proceed, it is clear that in a case like the present, where the issue is whether a state statute in its application to facts which are set out in detail in the pleadings and are admitted by demurrer, violates the Federal Constitution, this court must analyze the facts as averred and draw its own inferences as to their ultimate effect, and is not bound by the conclusion of the state supreme court in this regard. The only respect in such a case in which this court is bound by the judgment of the state supreme court is in the construction which that court puts upon the statute."

In the case of *A. & V. Ry. Co. v. J. & E. Ry. Co.* 271 U. S. 244, 70 L. ed. 928, the court used the following language:

"It is true that in this case the state court found that the place selected for the junction was a proper one. But the power to make the determination whether state action will obstruct interstate commerce inheres in the United States as an incident of its power to regulate such commerce."

In the case of *K. C. Structural Steel Co. v. State of Arkansas,* 269 U. S. 148, 70 L. ed. 204, the court used the following language:

"The supreme court of Arkansas held that the things done by plaintiff in error before August 17, 1921, constituted intrastate business in Arkansas. But the plaintiff in error contends that all was interstate commerce. We accept the decision of the supreme court of Arkansas as to what constitutes the doing of business in that state within the meaning of its own laws. *Georgia v. Chattanooga,* 264

U. S. 472, 483, 68 L. ed. 796, 800, 44 Sup. Ct. Rep. 369. But this court will determine for itself whether what was done by plaintiff in error was interstate commerce and whether the state enactments as applied are repugnant to the commerce clause. Plaintiff in error cites *Dahnke-Walker Mill v. Bondurant*, 257 U. S. 282, 66 L. ed. 239, 42 Sup. Ct. Rep. 106. It was there held that, 'Such commerce (among the states) is not confined to transportation from one state to another, but comprehends all commercial intercourse between different states and all the component parts of that intercourse.' (p. 290); and that, 'A corporation of one State may go into another, without obtaining the leave or license of the latter, for all the legitimate purposes of such commerce; and any statute of the latter state which obstructs or lays a burden on the exercise of this privilege is void under the commerce clause' (p. 291). In that case, a Tennessee corporation, in pursuance of its practice of purchasing grain in Kentucky to be transported to and used in its Tennessee mill, made a contract for the purpose of wheat to be delivered in Kentucky on the cars of a public carrier, intending to forward it as soon as delivery was made. It was held that the transaction was interstate commerce, notwithstanding the contract was made and was to be performed in Kentucky. All the things done in Kentucky had reference to and were included in the interstate transaction."

In *LaCoste v. Department of Conservation*, 263 U. S. 545, 68 L. ed. 437, this court used the following language:

"This court will determine for itself what is the necessary operation and effect of a state law challenged on the ground that it interferes with or burdens interstate commerce. The name, description or characterization given it by the legislature or the courts of the state will not necessarily con-

trol. Regard must be had to the substance of the measure rather than its form. *Looney v. Crane Co.* 245 U. S. 178, 189, et seq., 62 L. ed. 230, 235, 38 Sup. Ct. Rep. 85; *Kansas City Ft. S. & M. R. Co. v. Botkin,* 240 U. S. 227, 60 L. ed. 617, 36 Sup. Ct. Rep. 261; *St. Louis Southwestern R. Co. v. Arkansas,* 235 U. S. 350, 362, 59 L. ed. 265, 271, 35 Sup. Ct. Rep. 99; *United States Exp. Co. v. Minnesota,* 223 U. S. 335, 346, 56 L. ed. 459, 465, 32 Sup. Ct. Rep. 211; *Galveston H. & S. A. R. Co. v. Texas,* 210 U. S. 217, 227, 52 L. ed. 1031, 1037, 28 Sup. Ct. Rep. 638."

POINT II

SECTIONS 4 AND 13 OF THE "SHRIMP ACT" AND SECTIONS 2 AND 3 OF THE "OYSTER ACT" VIOLATE THE 14th AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN THAT PLAINTIFFS IN ERROR ARE DEPRIVED OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

The acts of the state of Louisiana violate the 14th Amendment to the Constitution of the United States for the reason that the Foster Fountain Packing Co. is prohibited from acquiring and selling in interstate commerce shrimp, and the Sea Food Company of Mississippi is denied the right to purchase the same. The Sea Food Company of Louisiana is denied the right to purchase and sell in interstate commerce oysters, and L. O. Johnson, Jr., is denied the right to purchase the same, unless the vendor corporations shall acquire and operate factories or drying plants in the state of Louisiana, thereby depriving each of them of their property without due process of law.

The right to contract is property, and is protected by the fourteenth amendment to the constitution of the United States. *Truax v. Corrigan*, 257 U. S. 312, 66 L. ed. 205.

The right of property includes the right to acquire, use, and dispose of it *Buchannan v. Worley*, 245 U. S. 861, 62 L. ed. 149.

The right to contract is property, protected by the fourteenth amendment to the constitution of the United States. *St. Louis Cotton Compress Company v. Arkansas*, 260 U. S. 346, 67 L. ed. 297.

A statute can not regulate arbitrarily a material to be used in the manufacture of beds. *Weaver v. Palmer*, 270 U. S. 402, 70 L. ed. 654.

In the case of *Charles Wolf v. Court of Industrial Relations*, 262 U. S. 522, 67 L. ed. 1103, an act regulating wages to be paid by an employer was held to be unconstitutional, as interfering with the right of contract.

To the same effect was *Meyer v. Nebraska*, 262 U. S. 390, 67 L. ed. 1042. *Adkins v. Childrens Hospital*, 261 U. S. 525, 67 L. ed. 785.

A state statute which requires a person operating motor busses, under contract of carriage with one person, is denied the equality of the law in being required to become a public carrier and transport for all persons. *Frost v. Railroad Commission*, 271 U. S. 583, 70 L. ed. 1101.

In the case of *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 53 L. ed. 417, the court used the following language:

> "*National Cotton Oil Co. v. Texas*, 197 U. S. 115, 49 L. ed. 689, 25 Sup. Ct. Rep. 379; *Smiley v. Kansas*, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289. Having the power to pass laws of this character, of course, the state may provide for proceedings to enforce the same. The state, keeping within constitutional limitations, may provide its own method of procedure and determine the methods and means by which such laws may be made effectual. 'The limit of the full control which the state has in the proceedings of its courts, both in civil and criminal cases, is subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable

provisions of the Federal constitution.' *West v. Louisiana*, 194 U. S. 258, 263, 48 L. ed. 965, 969, 24 Sup. Ct. Rep. 650; and see *Davis v. Texas*, 139 U. S. 651, 35 L. ed. 300, 11 Sup. Ct. Rep. 675; *Brown v. New Jersey*, 175 U. S. 172, 175, 44 L. ed. 119, 120, 20 Sup. Ct. Rep. 77; *Allen v. Georgia*, 166 U. S. 138, 140, 41 L. ed. 949, 950, 17 Sup. Ct. Rep. 525; Re Converse, 137 U. S. 624, 632, 34 L. ed. 796, 799, 11 Sup. Ct. Rep. 191; and *Twining v. New Jersey*, 211 U. S. 78, ante, 97, 29 Sup. Ct. Rep. 14, decided at this term of court, where the subject is fully discussed, and previous cases in this court cited."

Other cases directly in point are *Smith v. Texas*, 233 U. S. 630, 58 L. ed. 1129; *Adams v. Tanner*, 244 U. S. 590, 61 L. ed. 133; *New York Life Ins. Co. v. Dodge*, 246 U. S. 357, 62 L. ed. 772.

Jay Burns Baking Co. v. Bryan, Gov. of Negraska, 264 U. S. 504, 68 L. ed. 813, holds that a state may not, in the guise of protection of the public, arbitrarily interfere with private business or impose unreasonable, unnecessary restrictions upon them.

(Page 826): "Undoubtedly the police power of the state may be exerted to protect purchasers from imposition by sale of shortweight loaves. *Schmidinger v. Chicago*, 226 U. S. 578, 588, 67 L. ed. 364, 368, 33 Sup. Ct. Rep. 182, Ann. Cas. 1914B, 284. Many laws have been passed for that purpose. But a state may not, under the guise of protecting the public, arbitrarily interfere with private business, or prohibit lawful occupations, or impose unreasonable and unnecessary restrictions upon them. *Lawton v. Steele*, 152 U. S. 137, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; *Meyer v. Nebraska*, 262 U. S. 390, 399, 67 L. ed. 1042, 1045, 29 A. L. R. 1446, 43 Sup. Ct. Rep. 625. Constitutional protection having been

invoked, it is the duty of the court to determine whether the challenged provision has reasonable relation to the protection of purchasers of bread against fraud by short-weights, and really tends to accomplish the purpose for which it was enacted. *Meyer v. Nebraska*, supra; *Welch v. Swasey*, 214 U. S. 91, 105, 53 L. ed. 923, 29 Sup. Ct. Rep. 567; *Dobbins v. Los Angeles*, 195 U. S. 223, 236, 49 L. ed. 169, 175, 25 Sup. Ct. Rep. 18; *Connolly v. Sewer Pipe Co.* 184 U. S. 540, 556 46 L. ed. 679, 688, 22 Sup. Ct. Rep. 431; *Lawton v. Steele*, supra."

POINT III

SECTION 4 OF THE "SHRIMP ACT" AND SECTION 2 OF THE "OYSTER ACT" VIOLATE THE 14th AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN THAT THEY DENY TO THE COMPLAINANT IN ERROR THE EQUAL PROTECTION OF THE LAW, IF SUCH SECTIONS SHALL BE CONSTRUED SO AS TO PROHIBIT THE SEA FOOD COMPANY OF LOUISIANA AND THE FOSTER FOUNTAIN PACKING CO., INC., OF LOUISIANA, FROM CATCHING FISH OR TAKING OYSTERS FROM THE PUBLIC REEFS IN THE STATE OF LOUISIANA, IN THAT SUCH CONSTRUCTION WOULD DEPRIVE THEM OF THE EQUAL PROTECTION OF THE LAW.

It is not perfectly clear to us as to whether or not opposing counsel contend that the legislature of the state of Louisiana can give to the resident of a state the right without limit as to quantities, during the open season, to catch shrimp from the public waters within three miles of the shore, and to take oysters from the public reefs. We rather gathered from the arguments of counsel at the hearing that no distinction was made between an individual resident and a corporation organized under the laws of the state. We respectfully submit, however, that no such distinction could be justified. As to an individual the act does not require that the resident shall have lived in the state for any length of time. These vendor corporations are residents of the state of Louisiana; they are organized and chartered under the laws of the state of Louisiana; their charters expressly conferring upon them that power, to catch and import fish. We respectfully submit that these corporations are persons within the meaning of the 14th Amendment to the Constitution of the United States providing equal protection of the law. *Southern R. R. Co. v. Greene,* 216

U. S. 400, 54 L. Ed. 536; *Santa Clara County v. Sou. &c. R. Co.* 118 U. S. 394, 30 L. ed. 118, *Pembina Consol. Silv. Min. Co. v. Penn.* 125 U. S. 181 31 L. ed. 650; *Charlotte &c. R. Co. v. Gibbons,* 142 U. S. 386, 35 L. ed. 1051; *Covington &c. Tpk. Road Co. v. Sandford,* 164 U. S. 578, 41 L. ed. 560; *Gulf R. Co. v. Ellis,* 165 U. S. 150; *Smyth v. Ames,* 169 U. S. 466, 42 L. ed. 819.

Dealing with the question of the title of the state to these natural resources, it holds the same as trustee for the people of the state, which trust must be administered without discrimination.

In *Gratz v. McKenzie,* 258 Fed. 338, (Eighth Circuit Court of Appeal) Mr. Justice Garland, as organ of the court, said:

> "Fish, generally speaking, on account of their migratory character and for want of a fixed habitat, are classified as animal ferrae naturae. Their ownership, while they are in a state of freedom is in the State, *not as proprietor, but in its sovereign capacity as the representative and for the benefit of all its people in common and the ownership may not be claimed by any particular individuals.* 11 R. C. L. 1015; *State v. Heger,* 194 Mo. 711; *State v. Weber,* 205 Mo. 36; 10 L. R. A. (N.S.) 1155.
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> "The difference in the locomotive powers of swimming fish and shell fish, however, justifies a distinction as to their ownership. *In their natural state, shell fish, like swimming fish, are classified as ferrae naturae, and their ownership is vested in the state in its sovereign capacity.* 19 Cyc. 988 B; Vol. 11, R. C. L. page 1017.
>
> "*Oysters and clams which are planted where they do not naturally grow and the location of which is marked by posts or otherwise, are the subject of private ownership.* R. C. L. Vol. 11, page 1018."

As said by this honorable Court in *McCready v. Virginia*, 94 U. S. 394:

> "The planting of oysters in the soil covered by water owned in common by the people of the state is not different in principle than from that of planting corn upon dry land held in the same way. Both are for the purpose of cultivation and profits; and if the state, in the regulation of its public domain, can grant to its own citizens exclusive use of dry lands, we see no reason why it may not do the same thing in respect to such as are covered by water, and as all concede that a state may grant to one of its citizens the exclusive use of a part of the common property, the conclusion would seem to follow that it might by appropriate legislation confine the use of the whole to its own people alone."

In *Smith v. Maryland*, 18 How. 71, Mr. Chief Justice Curtis, on page 74, said:

> "Whatever soil below low water mark is the subject of exclusive propriety and ownership belongs to the state, on whose maritime border, and within whose territory it lies. * * * * *But the soil is held by the state, not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish, as well shell as floating fish.* * * * The state holds the propriety of this soil for the conservation of the public rights of fishery thereon, and may regulate the modes of that enjoyment so as to prevent the destruction of the fishery. In other words, it may forbid all such acts as would render the public rights less valuable, or destroy it altogether. This power results from the ownership of the soil, from the legislative jurisdiction over it, and from its duty to preserve unimpaired those public uses for which the soil is held.

"The law now in question is of this character. Its avowed, and unquestionably its real object is to prevent the destruction of oysters within the waters of the state, by the use of particular instruments in taking them. *It does not touch the subject of the common liberty of taking oysters, save for the* purpose of guarding them from injury to whomsoever they may belong, and by whomsoever they may be enjoyed. *Whether this liberty belongs exclusively to the citizens of the state of Maryland, or may lawfully be enjoyed in common by all the citizens of the United States; whether this public use may be restricted by the state to its own citizens, or a part of them, or by force of the constitution of the United States, must remain common to all citizens of the United States; whether the national government by a treaty or act of congress can grant to foreigners the right to participate therein, or what in general are the limits of the trust upon which the state holds this soil, or its power to define and control that trust,* are matters wholly without the scope of this case, and upon which we give no opinion."

No reasonable classification could be predicated based upon a distinction between a resident and a domestic corporation, which would justify attaching to the condition of taking fish on the part of the corporation, that it operate a plant in the state. The resident is permitted, without operating the plant, to catch the fish and take the oysters without limit as to quantity, and/or number. The domestic corporation is denied the right to participate in the distribution of the public domain except on most onerous conditions. The erection and operation of a drying or canning plant would have no relation whatever to the conservation of the natural resources, because it would necessarily be contemplated that an individual or a corporation owning the drying plant or canning factory would contemplate not keeping the commodity within the state but shipping them out. Therefore, the distinc-

tion has no relation in any true sense of the legitimate exercise of the police power of the state. We submit to the Court the following authorities upon that proposition.

In the case of *Royster Guano Co. v. Virginia*, 253 U. S. 412, 64 L. ed. 989, it appeared that the state of Virginia had an act exempting domestic corporations from an income tax where all of their business was carried on outside of the state, imposing liability, however, upon domestic corporations doing business both within and without the state upon the income of such corporations, whether derived from within or without the state. The Supreme Court of the United States used the following language:

> "It is unnecessary to say that the 'equal protection of the laws' required by the 14th Amendment does not prevent the states from resorting to classification for the purpose of legislation. Numerous and familiar divisions of this court establish that they have a wide range of discretion in that regard. But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. The latitude of discretion is notably wide in the classification of property for purposes of taxation and the granting of partial or total exemptions upon grounds of policy. *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 237, 33 L. ed. 892, 895, 10 Sup. Ct. Rep. 533; *Michigan C. R. Co. v. Powers*, 201 U. S. 293, 50 L. ed. 744, 761, 25 Sup. Ct. Rep. 459; *Keeney v. New York*, 222 U. S. 525, 536, 56 L. ed. 299, 38 L. R. A. (N.S) 1139, 32 Sup. Ct. Rep. 105; *Citizens Teleph. Co. v. Fuller*, 229 U. S. 322, 329, 57 L. ed. 1206, 1213, 23 Sup. Ct. Rep. 833; *Northwestern Mut. L. Ins. Co. v. Wisconsin*, 247 U. S. 132, 139, 62 L.

ed. 1025, 1037, 38 Sup. Ct. Rep. 444; Nevertheless, a discriminatory tax law can not be sustained against the complaint of a party aggrieved if the classification appear to be altogether illusory. Now, both of the taxing provisions here in question relate to corporations organized under the laws of Virginia. It is the object of Chapter 495 to exempt such corporations from income taxes (as well as taxes upon intangible property) where they do no business within the state except holding their stockholders' meetings therein; manifestly, in recognition of the fact that Virginia corporations so circumstanced derive no governmental protection from the state warranting the imposition of taxes upon their incomes derived without the state, or property taxes upon their intangibles, and in recognition of the impolicy, if not injustice, of imposing such taxes upon them while they are liable, and presumably subjected, to taxation in the state or states where their income-producing business is conducted. But no ground is suggested, nor can we conceive of any. sustaining this exemption, which does not apply with equal or greater force as a ground for exempting from taxation the income of Virginia corporations derived from sources without the state where they also transact income producing business within the state. Corporations of this class derive no more protection from the state of their origin with respect to their outside business, and are no less subject to taxation by the states in which such business is conducted, than corporations of the other classes; and they are required to comply with the same laws as to the payment of organization taxes and annual registration fees and franchise taxes to the state of origin. Their business done within the state presumably is of some general benefit to the state, certainly enriches its treasury by the amount of the taxes paid upon the income derived therefrom; and the imposition upon them

under Chapter 472 of taxes not only upon this income, but also upon income that they derive from business conducted outside of the state (similar income of the favored corporations being exempted), has the effect of discriminating against them for that which ought to operate, if at all, in their favor. It is obvious that the ground of difference upon which the discrimination is rested has no fair or substantial relation to the proper object sought to be accomplished by the legislation. It follows that it is arbitrary in effect; and none the less because it is probable that the unequal operation of the taxing system was due to inadvertence rather than design."

In the case of *Gulf, Colorado & Santa Fe R. R. Co. v. W. H. Ellis*, 165 U. S. 150, 41 L. ed. 666, the legislature of the state of Texas passed an act imposing on railroads, for failure to pay certain classes of claims which did not exceed fifty dollars, a reasonable attorney's fees to be added to the judgment rendered in favor of the plaintiff. In the above named case, suit was brought against the railroad company for killing live stock. Recovery was had for the value of the live stock, as well as the attorney's fee. The attorney's fee was limited to $10.00 by the act. The railroad company pleaded that it was denied the equal protection of the laws under the 14th Amendment to the Constitution of the United States. The Supreme Court of the United States reversed the case, using the following language:

"But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the 14th Amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this court in *Yick Wo v. Hopkins*, 118 U. S. 356, 369 (30: 320, 326): 'When we consider the nature and the theory of our institutions of government, the principles upon

which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.' The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal—that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness.' While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision, as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and letter of which the former is the thought and spirit, and it is always safe to read the letter of the constitution in the spirit of the declaration of independence. No duty rests more imperatively upon the courts than the enforcement of these constitutional provisions intended to secure that equality of rights which is the foundation of free government. * *

"It must not be understood that by citing we endorse all of these decisions. Our purpose is rather to show the extent to which the courts of the various states have gone in enforcing the constitutional obligation of equal protection. Other cases of a similar character may be found in the reports, but a mere accumulation of authorities is of little value. It is apparent that the mere fact of classification is not sufficient to relieve the statute from the reach of the equality clause of the 14th Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable grounds—some difference which bears a just and proper relation to the attempted classification.

Tested by these principles, the statute in controversy cannot be sustained. The judgment of the Supreme Court of Texas is therefore reversed, and the case is remanded for further proceedings not inconsistent with this opinion."

In the case of *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220 the City of San Francisco passed an ordinance prohibiting the carrying on and operating of a laundry in framed buildings, except with the consent and permission of the local officer. The plaintiff in error and fellow countrymen, subjects of the Emperor of China, who had carried on their business for many years in the City, and desired to continue the same, though the permission was accorded to persons of other nationality were denied the permission. The plaintiff in error appealed to the courts, asserting rights under the 14th Amendment to the Constitution of the United States, the equal protection of the law. The Supreme Court of the United States held that in the administration of the law the rights of the plaintiff in error were denied, reversed the case, and used the following language:

"When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in

many cases of mere administration, the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights of life, liberty and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the Commonwealth 'may be a government of laws and not of men'. For the very idea that one may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself. * *

"This conclusion, and the reasoning on which it is based, are deductions from the face of the ordinance, as to its necessary tendency and ultimate actual operation. In the present case, we are not obligated to reason from the probable to the actual and pass, upon the validity of the ordinance complained of, as tried merely by the opportunities which their terms afford, or unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown to establish an administration directed to exclusively against a particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of

that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad benign provisions of the 14th Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and unequal hand, so as to practically make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution. This principle of interpretation has been sanctioned by this court in *Henderson v. May, etc. of New York*, 92 U. S. 259 (Bk. 23 L. ed. 450) & *Ex Parte Va.* 100 U. S. 339 (Bk. 25 L. ed. 679); *Neal v. Delaware*, 103 U. S. 370 (Bk. 26 L. ed. 277); and *Soon Hing v. Crowley* (supra)

"The present cases, as shown by the facts disclosed in the record are within this class. It appears that both petitioners have complied with every requisite deemed by the law or by the public officers charged with its administration necessary for the protection of neighboring property from fire, or as a precaution against injury to the public health. No reason whatever, except the will of the supervisors, is assigned why they would not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, upon which they depend for a livelihood. And while this consent of the supervisors is withheld from them and from two hundred others who have also petitioned, all of whom happened to be Chinese subjects eighty others, not Chinese subjects are permitted to carry on the same business under similar conditions. The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted that no reason for it exists except hostility to the race and nationality to which the petitioners belong,

and which in the eye of the law is not justified. The discrimination, therefore, is illegal, and the public administration which enforces it is a denia of the equal protection of the laws and a violation of the 14th Amendment to the Constitution of the United States. The imprisonment of the petitioners therefore is illegal, and they must be discharged."

In the case of *Charles U. Cotting v. Goddard, Attorney General*, 183 U. S. 79, 46 L. ed. 92, it appeared that the state of Kansas passed a statute limiting and regulating the charges to be made by a stockyard company without limiting the charges to be made by other similar corporations doing a similar business, and without reference to the character or value of the service rendered. The plaintiff in error, who was the proprietor of a stockyard, enjoined the enforcement of the statute on the ground that it denied him the equal protection of the law. The Supreme Court of the United States held that it was discriminating and deprived the plaintiff in error of the equal protection of the law, because the amount which the plaintiff in error was permitted to charge was smaller than other persons in the same line of business, and under similar circumstances, and rendering the same service, were permitted to charge, there being no reasonable basis of distinction or classification. The Supreme Court of the United States used the following language:

"But while recognizing to the fullest extent the impossibility of an imposition of duties and obligation mathematically equal upon all, and also recognizing the right of classification of industries and occupations, we must nevertheless always remember that the equal protection of the laws is guaranteed, and that such equal protection is denied when one or two parties engaged in the same kind of business and under the same conditions, burdens are cast which are not cast upon

the other. There can be no pretense that a stock-yard which receives ninety-nine head of cattle per day per year is not doing precisely the same business as one receiving one hundred and one head of cattle per day each year. It is the same business in all its essential elements, and the only difference is that one does more business than the other. But the receipt of an extra two head of cattle per day does not change the character of the business. If once the door is open to the affirmance of the proposition that a state may regulate one who does much business, while not regulating the other who does the same but less business, then all significance in the guaranty of the equal protection of the laws is lost, and the door is opened to inequality of legislation which Mr. Justice Catron referred to in the quotation above made. This statute is not simply legislation which in its indirect results different individuals or corporations differently or with those in which a classification is based on inherent differences in the character of the business, but is a positive and direct discrimination between persons engaged in the same class of business and based simply upon the quantity of the business which each may do. If such legislation does not deny the equal protection of the laws we are unable to perceive what legislation would. We think therefore, that the principle of the decision of the Supreme Court of Kansas in *State v. Haun*, 61 Kan. 146, 47 L. R. A. 369, 59 Pac. 340, is not only sound, but is controlling in this case, and that the statute must be held unconstitutional as in conflict with the equal protection clause of the 14th Amendment."

In the case of *Thomas Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. ed. 679, it appeared that the State of Illinois passed a statute to prevent trusts and combines. The statute was general in its nature, but eliminated from its operative provisions persons

engaged in agricultural pursuits, live stock, artisans, etc. The equal protection of the law was pleaded, which defenses were denied by the state court, and on appeal to the Supreme Court of the United States it held the act was discriminatory against other persons similarly situated, held the Statutes of Illinois unconstitutional and affirmed the case, using the following language:

> "These principles applied to the case before us condemn the statute of Illinois. We have seen that under that statute all except producers of agricultural commodities, and raisers of live stock, who combine their capital, skill or acts for any of the purposes named in the act, may be punished as criminals, while agriculturists and live stock raisers, in respect of their products or live stock in hand, are exemoted from the operation of the statute, and may combine and do that which, if done by others, would be a crime against the State. The statute so provides notwithstanding persons engaged in trade, or in the sale of merchandise and commodities, within the limits of a State, and agriculturists and raisers of live stock, are all in the same general class, that is, they are alike engaged in domestic trade, which is, of right, open to all, subject to such regulations, applicable alike to all in like conditions, as the State may legally prescribe.
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> "The difficulty is not met by saying that, generally speaking, the State, when enacting laws, may, in its discretion, make a classification of persons, firms, corporations and associations, in order to subserve public objects. For this Court has held that classifications 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily, and without any such basis. * * * *

But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. * * * * * No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government * * * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.' *Gulf Coast & S. F. R. Co. v. Ellis*, 165 U. S. 150, 155, 159, 160, 165, 41 L. ed., 666, 668, 670, 671, 17 Sup. Ct. Rep. 255, 257, 259, 261. These principles were recognized and applied in *Citting v. Kansas City Stock Yards Co.*, 183 U. S. 79, sub. nom. *Cotting v. Goddard*, ante, 92, 22 Supt. Ct. Rep. 30, in which it was unanimously agreed that a statute of Kansas regulating the charges of a particular stock yards company in the state, but which exempted certain stock yards from its operation, was repugnant to the Fourteenth Amendment in that it denied to that company the equal protection of the laws."

The case of *McFarland v. American Sugar Refining Company*, 241 U. S. 79, 60 L. ed. 899, is directly in point. In that case the American Sugar Refining Company, defendant in error, had a large sugar refinery plant at Chalmette, Louisiana, which had been idle for quite a period of time. The Louisiana Legislature passed an act punishing as a monopoly any sugar refiner having a refinery in the state which should pay more for sugar out of the state than in the state; and further provided that if any refiner allowed its plant

to remain idle for a period of twelve months it should be presumed that it was done for the purpose of violating the act. The American Sugar Refining Company, having ceased to operate its plant, proceedings were taken against it by the State officers whose duty it was to enforce the act, and an injunction was obtained in the United States Court. The Court held that the act authorizing the creation of a presumption of a violation of the act from the failure of the plaintiff in error to operate its plant for twelve months was a deprivation of property without due process of law, the Court using the following language:

> "The statute bristles with severities that touch the plaintiff alone, and raises many questions that would have to be answered before it could be sustained. We deem it sufficient to refer to those that were mentioned by the District Court; a classification which, if it does not confine itself to the American Sugar Refinery, at least is arbitrary beyond possible justice, and a creation of presumption and special powers against it can have no foundation except the intent to destroy. As to the classification, if a powerful rival of the plaintiff should do no refining within the state, it might systematically pay a less price for sugar in Louisiana than it paid elsewhere with none of the consequences attached to doing so in the plaintiff's case. So of any one who purchases but does not refine. So of any concern that does not buy and refine more sugar 'than the aggregate of the sugar produced by it from cane grown and purchased by it,' as easily might happen with a combination of planters, such as the answer gives us to understand has been attempted heretofore.
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> "As to the presumptions, of course, the Legislature may go a good way in raising one or in changing the burden of proof, but there are limits. It is 'essential that there shall be some rational

connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.' *Mobile, J. & K. R. Co. v. Turnipseed*, 219 U. S. 35, 43, 55 L. ed. 78, 80, 32 L. R. A. (N.S.) 226, 31 Sup. Ct. Rep. 136, Ann. Cas. 1912 A. 463 2 N. C. C. A. 243. The presumption created here has no relation in experience to general facts. It has no foundation except with tacit reference to the plaintiff. But it is not within the province of a legislature to declare an individual guilty of presumptively guilty of a crime. If the statute had said what it was argued that it means, that the plaintiff's business was affected with a public interest by reason of the plaintiff's monopolizing it, and that therefore the plaintiff should be prima facie presumed guilty upon proof that it was carrying on business as it does, we suppose that no one would contend that the plaintiff was given the equal protection of the laws. We agree with the court below that the act must fall as a whole, as it falls in the sections without which there is no reason to suppose that it would have been passed."

In other words, there was a clear case of discrimination because, as the court pointed out, a refiner operating its plant in Louisiana could have paid a higher price for sugar outside of the state than in the state without incurring the penalties provided in the act.

In *Buck v. Kuykendall*, 267 U. S. 307, 69 L. ed. 623, the court held that the operator of an auto vehicle could not be denied the right to operate on the highways except by securing a certificate of public convenience. The court used the following language:

"By motion to dismiss, filed in this court, the state makes the further contention that Buck is estopped from seeking relief against the provisions of section 4. The argument is this: Buck's claim is not that the department's action is unconstitutional because arbitrary or unreasonable. It is that section 4 is unconstitutional because use of the highways for interstate commerce is denied unless the prescribed certificate shall have been secured. Buck applied for a certificate. Thus he invoked the exercise of the power which he now assails. One who invokes the provisions of a law may not thereafter question its constitutionality. The argument is unsound. It is true that one cannot, in the same proceeding, both assail a statute and rely upon it. *Hurley v. Commission of Fisheries*, 257 U. S. 223, 225, 66 L. ed. 206, 207, 42 Sup. Ct. Rep. 83. Compare *Wall v. Parrot, Silv. & Copper Co.* 244 U. S. 407, 411, 61 L. ed. 1229, 1230, 37 Sup. Ct. Rep. 609. Nor can one who avails himself of the benefits conferred by a statute deny its validity. *Pierce Oil Corp. v. Phoenix Ref. Co.* 259 U. S. 125, 66 L. ed. 855, 42 Sup. Ct. Rep. 440; *St. Louis Malleable Casting Co. v. George C. Prendergast Constr. Co.* 260 U. S. 469, 472, 67 L. ed. 351, 354, 43 Sup. Ct. Rep. 178. But in the case at bar, Buck does not rely upon any provision of the statute assailed; and he has received no benefit under it. He was willing, if permitted to use the highways, to comply with all the laws relating to common carriers. But the permission sought was denied. The case presents no element of estoppel. Compare *Arizona ex rel. Gaines, v. Copper Queen Consol. Min. Co.* 233 U. S. 87, 94 et seq. 58 L. ed. 863, 866, 34 Sup. Ct. Rep. 546."

POINT IV

SECTIONS 13 AND 19 OF THE SHRIMP ACT, AND SECTIONS 3, 23 AND 24 OF THE OYSTER ACT, AS ENFORCED AND CONSTRUED BY THE DEFENDANTS IN ERROR, EACH VIOLATE THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, IN THAT THE SAME DEPRIVE THE APPELLANTS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW, AND DENY THEM THE EQUAL PROTECTION OF THE LAW.

The Shrimp Act prohibits shrimp from being transported from the State of Louisiana, except after the heads and hulls have been taken therefrom, where such shrimp are caught within three miles of the Louisiana shores, in the waters described in the original bill of complaint in cause Number 768.

The Oyster Act prohibits oysters being shipped from the State of Louisiana in the shells under any circumstances.

In cause Number 768 the original bill of complaint charges that the raw shrimp dealers in the State of Louisiana are intentionally and habitually, to the knowledge of defendants, permitted to ship out the shrimp in violation of the Act, and that the same is being so construed as if the Act prohibited the shipping of shrimp out of the State for packing purposes. (Tr. 16).

In cause Number 769 (Tr. 18), the original bill of complaint charges that individual firms and corporations are knowingly and intentionally by the defendants in error permitted to ship out raw oysters in the shells, and that the Act is being so construed as only to prohibit oysters being transported from the State for the purpose of being canned.

When the Act of 1910 was passed, under construction in the Ferandeau Case, it prohibited the shipment of oysters out of the State to be canned. In the passage of the Act of 1910 the legislature of Louisiana was confronted with the fact that it did not desire to prohibit the shipment of oysters in the shells. To do so would interfere with what is known as the "raw oyster business"; that is to say, the shipping of oysters in the shells to other states for use as a food, especially in hotels and restaurants, which occasioned the Act of 1910 only prohibiting oysters being shipped out of the State for canning. In the meantime, prior to the passage of the Act of 1926, not only had the shipment of raw oysters in shells increased in volume and importance, but the shipment of raw shrimp had likewise grown to be one of great magnitude.

The proof in the Shrimp Case established that since the passage of the Shrimp Act, now under review, large quantities of raw shrimp were shipped out of the State of Louisiana by firms, individuals, and corporations, as dealers, to all parts of the country; and the same proof was offered in respect to the shipment of oysters in the shells. The proof not only establishes that the shipment of raw shrimp and oysters in the shells is one of very great importance in interstate commerce, but that there is every reason to expect that the volume and importance thereof will be greatly increased in the future; that canned shrimp and canned oysters are shipped to interior points where fresh shrimp and oysters cannot be conveniently obtained; but that with improved methods of refrigeration such as the development of dry ice, with improved facilities for transportation such as aviation, the sale of raw shrimp and raw oysters in the shells will gradually take the place of the manufactured packed and canned products. The people of Louisiana, therefore, appreciating the importance of the business and the development of which the same was capable,

in the Act of 1910 sought to preserve to itself all the benefits to be derived therefrom by permitting the shipment of oysters in the shells, where the same were not to be canned, out of the State.

The proof in this case establishes that when the shrimp and oyster bills were before the Legislature of the State of Louisiana in 1926 the packers at Biloxi, some of them Louisiana citizens, went before the Legislature of the State of Louisiana in order to defeat the passage of these bills. The statutes on their faces, if enforced as written, would necessarily interfere with and break up the raw shrimp business, as well as the large and profitable business of shipping out raw oysters in the shells. Therefore, the proof showed that the dealers in Louisiana in the shipment of raw shrimp and oysters in the shells made common cause with the packers on the Mississippi coast to defeat the bills; that an engagement was made to meet the Louisiana shrimp and oyster packers at Baton Rouge and use all legitimate efforts to defeat the passage of the bills by appearing before a legislative committee. The proof shows that the raw shrimp and oyster packers came to Baton Rouge in the evening, but did not go before the committee; but, upon the other hand, informed those persons interested in packing shrimp and canning oysters on the Mississippi coast that they had been promised, if their opposition was withdrawn to the bill, that the Act would never be construed or enforced so as to prevent or interfere with the shipment of raw shrimp in the hulls or oysters in the shells. The affidavit of L. O. Johnson, Jr., and R. H. Chinn, (Tr. 54) and the appellants at the trial of the application for interlocutory injunction in cause Number 768 introduced a large volume of proof going to show that the Shrimp Act in question was construed in accordance with the agreement with raw shrimp dealers, set out in the foregoing affidavits.

The following affidavits were introduced for the purpose of showing that after passage of the Shrimp Act and its effective date of enforcement, while the officers of the Conservation Department were active, alert and aggressive in preventing shrimp from being taken out of the Louisiana waters to be packed out of the State, they knowingly permitted raw shrimp to be shipped out of the State without the heads and hulls being taken therefrom, although caught within three miles of the Louisiana shores: Affidavit of L. O. Johnson, Jr., and R. H. Chinn (Tr. 54-57); Affidavit of A. S. Gorenflo, a Louisiana fisherman, and eleven other fishermen, (Tr. 60). They make affidavit that no commercial shrimp are caught in Louisiana waters beyond the three mile limit; that all shrimp which are caught in Louisiana waters suitable for commercial purposes are caught within the three mile limit (Tr. 64); Affidavit of L. O. Johnson, Jr. (Tr. 66) that raw shrimp are shipped from the State of Louisiana without any kind of objection on the part of Louisiana officers, in violation of the Act (Tr. 66-67). See affidavit of Ernest Desporte (Tr. 82); Affidavit of Alex Misticos (Tr. 104), which is in the following language:

> "Personally came before me, the undersigned officer in and for the aforesaid state and county the within named Alex Misticos, who states that he is the proprietor of the Belmont Cafe in Jackson, Mississippi; that he buys raw shrimp from Paul Bougon Fish & Oyster Company, Inc., of New Orleans, Louisiana; that they are shipped to him raw shrimp, with the hulls on them, the heads taken off; that they come to him by express and are shipped in cases containing approximately fifteen to twenty pounds per case; the said shrimp being packed in ice in order to preserve them. Affiant buys in this manner about two cases every two or three days, and buys them from New Orleans, Louisiana, all the year around; that he herewith attaches as Exhibits 1 and 2 hereto tags taken from

cases of oysters or shrimp, which were received by him on Saturday morning October 22nd, 1927, from said Paul Bougon Fish & Oyster Company, Inc., New Orleans, Louisiana. Affiant states that he can obtain such shrimp from New Orleans, Louisiana, which are sea shrimp, in unlimited quantities."

See affidavit of L. J. Folse (Tr. 106), who states that he is thoroughly familiar with what is known as the "raw shrimp business" as carried on in the State of Louisiana; that he made a visit to the City of New Orleans, observed the operation of the business, and found from his observation that raw shrimp in unlimited quantities were being shipped out of the State of Louisiana in interstate commerce. The affidavit speaks for itself.

The only proof offered by the defendants in error contradictory thereof was the affidavit of Percy Viosca, Jr., (Tr. 39) who states that he is the director of the Fisheries Division of the Department of Conservation, and that such shrimp as are leaving the State of Louisiana in the raw state are taken more than three miles from the Louisiana shores.

We now turn to the question of the proof in Cause Number 769, in respect to the shipment of oysters in the shells. Of course, it was necessary for us to prove that the shrimp being shipped out were caught within three miles of the Louisiana shores. We endeavored to make this proof by the affidavits of twelve fishermen who lived in the neighborhood and fished in the waters where the shrimp are caught, who stated that all commercial shrimp are caught within three miles of the shore. The only contradiction of this proof is the affidavit of Dr. Viosca, if it amounts to a contradiction.

When we turn, however, to Cause Number 769, the Oyster Case, we are relieved of the complication growing out of the place where the oysters are caught, because the law prohibits any shipment out whatsoever; and in this case we offered a mass of testimony, which was practically uncontradicted, that firms, corporations and individuals in the State of Louisiana dealing in raw oysters are allowed without restriction to ship the same in the shells in interstate commerce, and that the business is being carried on just as before the Act. In other words, that the agreement made with the raw shippers, in order to get them to withdraw their opposition to the bill, is being not only literally carried out, but construed literally in their favor.

In this connection we would call your Honors' attention to the fact that the only contradictory proof in respect to the shipment of raw oysters in the shells is the affidavit of James N. McConnell in cause Number 769 (Tr. 87), which contains the following statement:

> "So far as I have any knowledge, there are no oysters in the shells permitted to go outside the state, and my force is instructed to prevent that being done. If it is done it is done surreptitiously and without the knowledge of any of our officers.
>
> "The supply of oysters in Louisiana is not inexhaustible and it is necessary that conservation measures be applied thereto in order to insure an ample supply of oysters."

We direct the attention of the Court to the only testimony which the defendants in error offered in the first instance, in order that we may with greater bene-

fit to the Court demonstrate not only that the allegations of the bill of complaint were not denied in respect thereto, but that the testimony offered for the plaintiffs in error was not contradicted at all.

First, we direct the attention of the Court to the original bill of complaint, filed January 20, 1928, wherein it was charged that the Act was being so construed by the defendants in error as if the same only prohibited the shipping of oysters out of the State for the purpose of being canned. We direct your Honors' attention to the fact that no answer was filed to the original bill of complaint; the defendants in error filed what is known as a return or an exception (Tr. 36), which necessarily admitted the allegations therein contained. But that is not all. As before stated, the bill was filed on the 20th, day of January, 1928. Well, certainly, if your Honors please, that put the defendants in error on notice as to the contention of the appellants as to the construction of the Act complained of. In the light of this explanation, we now direct the attention of the Court to the undisputed proof in respect to the subject-matter. The affidavit of A. R. Heidenheim (Tr. 43) contains the following language:

> "Affiant further states on information and belief that the law now complained of is now being openly violated by shippers of raw oysters who are allowed to ship oysters in large quantities to numerous persons without removing the shell, the whole purpose of said law being to compel canners of oysters to locate their canning factories in Louisiana."

The affidavit of R. H. Chinn (Tr. 47) to the same effect. We especially direct the attention of the Court to the affidavit of Theodore Grillis (Tr. 52). The affidavit was made January 26, 1928, six days after the original bill of complaint was filed and the defendants in error put on notice as to the construction being

put on the Act. Mr. Grillis operates a restaurant in the City of Jackson, Mississippi; he offers for sale, and sells, large quantities of oysters in the shell, which he buys from New Orleans, Louisiana. The affidavit is so illuminating that we quote from the same literally, as follows: (Tr. 52-54):

> "Affiant states that there is hereto attached a photograph of his restaurant taken from the exterior, showing oysters on the shell on the inside of the show window kept on ice; that said oysters are what is known as Louisiana oysters, which are grown and shipped to affiant in Jackson, Mississippi, by American Railway Express from New Orleans in the State of Louisiana; that just inside of said show window is a sign, conspicuously posted, upon which is written the following language: 'Louisiana Bayou Cook Oysters on the Half Shell.' That affiant is now and has been continuously solicited by New Orleans packers and dealers by price lists, wherein they have sought to sell him oysters in the shell to be shipped from New Orleans in the State of Louisiana, and that this course of business existed prior to January 1, 1928, and has continued without interruption since such date; that he has continuously, since the first of January, 1928, in the due course of business, procured from packers and dealers in New Orleans, Louisiana, shipped to him by express, oysters in the shell, which he has in due course of business sold to his customers in his restaurant, the photograph of which is hereto attached and marked Exhibit 1, the same being asked to be considered as if set out herein in full in words and figures.
>
> "Affiant states that he gets several barrels of oysters in the shell per week, shipped to him by dealers in New Orleans, Louisiana, to Jackson, Hinds County, Mississippi; that the oysters which he gets are merely measured by his requirements;

that he could buy from such source oysters in the shell by the car load per day, without restriction or limitation. Affiant states that upon the morning of January 23rd, 1928, in due course of business, he received from Paul Ziblich Company, Inc., of New Orleans, Louisiana, one barrel of raw oysters; that said oysters came to him by express; that upon the morning of January 24th, 1928, he received from the said Louisiana corporation two barrels of raw oysters in shells in interstate commerce by the American Railway Express Company; that the original invoice is hereto attached and marked Exhibit 2, the same being asked to be considered as if set forth herein in full in words and figures; that the American Railway Express receipt therefor, with charges thereof, is hereto attached and marked Exhibit 3, the same being asked to be considered as if set forth herein in full in words and figures.

"Affiant states that he believes he could have gotten a car load of raw oysters in shells contained in barrels or sacks as readily and easily as the foregoing purchases were made. Affiant states that the oysters received by him on the morning of January 24th, 1928, as were other oysters, were shipped in barrels containing a top set down within the barrel; that the top is made of wood, and on the top of the barrel there was contained, and on top of all the barrels shipped to him, there is usually contained, the following indorsement: 'The Original Bayou Creek Oysters, packed by Paul Ziblich Company, Inc., New Orleans, La., State Board of Health Permit No. 36'.

"Affiant states that he will endeavor to have made a photographic copy of the top of said barrel with the endorsement hereinbefore set out, and if he can do so, the same will be made Exhibit 4 to this affidavit, and the same is asked to be considered as if set out herein in full in words and figures, affiant attaches exhibits and letter dated Jan. 9th, 1928 from said Ziblich Co., Inc."

Dominick Caravella, who operates a restaurant in Vicksburg, Mississippi, (Tr. 54) makes a similar affidavit, dated the 24th day of January, 1928.

B. C. Young, a restaurant keeper, Vicksburg, Mississippi, makes a similar affidavit.

Pete Messina, a restaurant keeper, in Vicksburg, Mississippi, on January 26, 1928, (Tr. 56) makes a similar affidavit showing that restaurant keepers since the 1st of January, 1928, before and after the filing of the original bill of complaint, were obtaining from New Orleans, Louisiana, in any quantities which they desired, raw oysters in the shells.

Charley Chagare, operator of a restaurant in Meridian, Mississippi, (Tr. 58) makes a similar affidavit.

K. Joseph, a restaurant keeper, of Hattiesburg, Mississippi, (Tr. 58) makes a similar affidavit, showing that oysters in the shells were during the period mentioned being shipped from New Orleans, Louisiana, to Meridian and Hattiesburg, Mississippi.

E. J. Misticos, operator of a restaurant in Jackson, Mississippi, (Tr. 59) makes a similar affidavit under date of January 26, 1928, showing that upon the morning of the 24th of January, 1928, he received a shipment of raw oysters in the shells from New Orleans, Louisiana, identifies the invoice of the American Railway Express Company receipted therefor, and states that they may be bought in unlimited quantities. We refer the Court to the affidavit.

We also refer the Court to the affidavit of D. J. Goodin, who went to New Orleans, Louisiana, as the representative of the plaintiffs in error, about January 10, 1928, and stayed a week. In his affidavit (Tr. 61) he describes in great detail the shipping out of raw

oysters from the City of New Orleans, Louisiana, in interstate commerce; that as it appears from the affidavit, the dealers in the City of New Orleans are active and alert, soliciting the trade; that a shipment may be procured to be sent anywhere in the United States in unlimited quantities without any kind of restriction, no inspection thereof, and no effort made to enforce the law. We direct the attention of the Court to the affidavit. The witness further states that he traveled from New Orleans, Louisiana, to Jackson, Mississippi, on an interstate passenger train, and that after he passed the Louisiana line and reached Mississippi, Louisiana oysters on the half shell were served in the dining car without any kind of restriction. Affiant further states (Tr. 66) that on January 22nd, 1928, he went to Memphis, Tennessee, on an interstate passenger train, and that raw oysters on the half shell were served in the dining car; that in Memphis, Tennessee, there is a restaurant known as the "Madison Sea Food Company", in front of which is a large window filled with raw oysters in the shell, shipped from New Orleans, Louisiana. The witness further makes affidavit that he applied to the representative of the Express Company in Memphis, Tennessee, and he admitted that they were handling out of New Orleans, Louisiana, into Mississippi and Tennessee shipments of raw oysters in the shell, declined to show him the books, but stated, however, that the information would be furnished before any court.

We also refer to the affidavit of W. H. Lucas (Tr. 69) the restaurant keeper at Laurel, Mississippi, in which he states that you can buy all the oysters in the shell from New Orleans, Louisiana, desired.

We also direct the attention of the Court to the affidavit of J. R. McKinnon, (Tr. 72) who states that he went to New Orleans, Louisiana, observed the conditions, and actually saw and observed the business of the shipment of raw oysters in the shells out of the City of New Orleans in large quantities, with no effort to enforce the law.

We also refer to the affidavit of Henry Weidmann, (Tr. 74) operator of a restaurant in Meridian, Mississippi, from which it appears that before and after the filing of the original bill of complaint, without restriction, he procured oysters in the shell from New Orleans, Louisiana.

From these affidavits, it abundantly appears that while individuals, firms and corporations engaged in the raw oyster and raw shrimp business are permitted in unlimited quantities to ship out in interstate commerce shrimp and oysters for commercial purposes, the plaintiffs in error, Louisiana corporations, are denied the same privilege. In other words, the law is being in its construction so enforced as to violate the Fourteenth Amendment to the Constitution of the United States, in that the same deprives the plaintiffs in error of their property without due process of law, and denies them the equal protection of the law, in respect to which we submit the following authorities:

The act of officers charged with the enforcement of the act is the act of the State. In the case of *Home Telephone & Telegraph Co. v. City of Los Angeles*, 227 U. S. 278, 57 L. ed. 510, it appeared that the officers of a municipality, acting under authority given by state statute and city ordinance, put into effect a city ordinance applying confiscatory rates to the telephone company. The enforcement of the ordinance fixing the rates was enjoined on the ground that the city violated the Fourteenth Amendment to the Constitution of the United States. The municipality claimed that the act of the municipal officers was not that of the state. This court held that when certain officers had the power to enforce a legislative enactment, or a municipal ordinance, that the conduct of such officers was the act of the State.

In the case of *Neal v. Delaware*, 103 U. S. (13 Otto) 370, 26 L. ed. 367, the plaintiff in error was a negro, indicted for crime, and challenged the right of the

Court to proceed with his trial because under the local practice members of the African race, to which he belonged, were intentionally and systematically and customarily eliminated from jury service, which, it was claimed, was an unjust discrimination against him and the members of his race, and denied him the equal protection of the law. He was convicted and appealed to the Supreme Court of the United States, and in reversing the case the following language was used upon the question of discrimination:

> "What we have said leads to the conclusion that the State Court did not err in disregarding the petition for removal.
>
> "The remaining question relates to the denial of the motions to quash the indictment and the panels of jurors. The grounds upon which the motions were placed were formally and distinctly stated, and are fully set out in the bill of exceptions. They were the same as those assigned in the verified petition filed by the accused for the removal of the prosecution into the Circuit Court of the United States, viz: That from the grand jury that found, and from the petit jury that was summoned to try the indictment, citizens of the African race, qualified in all respects to serve as jurors, were excluded from the panel, because of their race and color; and that, in fact, persons of that race, though possessing all of the requisite qualifications have always, in that county and state, been excluded, because of their race; from serving on juries. That colored persons have always been excluded from juries in the courts of Delaware was conceded in the argument, and was likewise conceded in the court below. The Chief Justice, however, accompanied that concession with the remark in reference to this case, 'That none but white men were selected is in no wise remarkable in view of the fact—too notorious to be

ignored—that the great body of black men residing in this state are utterly unqualified by want of intelligence, experience, or moral integrity to sit on juries.' The exceptions, he said, were rare.

"Although, for the reasons we have given, the accused was not entitled to a removal of this prosecution into the Circuit Court of the United States, he is not without remedy if the officers of the State charged with the duty of selecting the jurors were guilty of the offense charged in the defendant's petition. A denial upon their part of the right of the accused to the selection of grand and petit jurors without discrimination against his race, because of their race, would be a violation of the Constitution and laws of the United States, which the trial court was bound to redress. As said by us in *Va. v. Rives*, 'The Court will correct the wrong; will quash the indictment, or the panel; or, if not, the error will be corrected in a superior court,' and, ultimately, in this Court upon review (100 U. S. 322— X XV—671).

"We repeat what was said in that case, that while a colored citizen, party to a trial involving life, liberty or property, cannot claim, as matter of right, that his race shall have a representation on the jury, and while a mixed jury in a particular case is not within the meaning of the Constitution, always or absolutely necessary to the equal protection of the law, it is a right to which he is entitled, 'That in the selection of jurors to pass upon his life, liberty or property, there shall be no exclusion of his race and no discrimination against them, because of their color.' So that we need only inquire whether, upon the showing made by the accused, the Court erred in overruling the motions to quash the indictment and the panels of jurors."

In the case of *Carter v. State of Texas*, 177 U. S. 442, 33 L. ed. 839, Carter was a negro indicted for crime, who moved to quash the indictment because members of the African race, to which he belonged, although qualified, were systematically and intentionally excluded from service on the juries, which right was denied him. He asserted that he was denied the equal protection of the law, and appealed to the Supreme Court of the United States. The case was reversed, the court using the following language:

> "Wherever by any action of a state, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race and color, from serving as grand jurors in the criminal prosecutions of a person of the African race, the equal protection of the laws is denied him, contrary to the Fourteenth Amendment of the Constitution of the United States, (*Strauder v. West Virginia*, 100 U. S. 303, 25 L. ed. 664; *Neal v. Delaware*, 103 U. S. 370, 379, 26 L. ed. 567, 574; *Gibson v. State of Miss.* 162 U. S. 565, 40 L. ed. 1075, 16 Sup. Ct. Rep. 904)."

A state court may control the constitutionality of a state statute through adding something to it or taking something away from it by construction.

See the case of *Osborne v. State of Florida*, 164 U. S. 650, 41 L. Ed. 586, wherein the Supreme Court of the United States had under construction a statute of the State of Florida, which on its face compelled all express companies doing business within the state to pay a certain privilege tax. The Supreme Court of the State of Florida had passed on the act and held that it only applied to intrastate business, although on its face in fact it did refer both to interstate and intrastate business. The Supreme Court of the United States, in sustaining the validity of the statute, used the following language:

"The Supreme Court of Florida has construed the ninth section of this act and has held in express terms that it does not apply to or affect in any manner the business of this company, which is interstate in its character; that it applies to and affects only its business which is done within the state or as is so termed local in its character; and it has held that under that statute so long as the express company confines its operation to express business that consists of interstate or foreign commerce, it is wholly exempt from the legislation in question."

The doctrine was approved in *Hamlin v. Texas*, 198 U. S. 579, 49 L. Ed. 1171.

In the case of *Armour Packing Co. v. Lacey*, 200 U. S. 234, 50 L. Ed. 456, where a privilege tax was imposed on packing houses, the Supreme Court of the United States held the act valid, because the state court by construction confined the act to intrastate business.

The same result was had in *Pullman Co. v. Adams*, 189 U. S. 422, 41 L. Ed. 878, affirming 78 Miss. 839.

A statute may be construed by officers.

In the case of *Greene v. R. R. Co.* 244 U. S. 499, 61 L. Ed. 1280, which was a complaint in equity in the federal court on account of discrimination of taxing officers, the court used the following language:

"A substantially identical question was presented to the circuit court of appeals for the sixth circuit in *Taylor v. Louisville & N. R. Co.*, 31 C. C. A. 537, 60 U. S. App. 166, 88 Fed. 350, where the Constitution of Tennessee declared that all property should be taxed according to its value, to be ascertained as the legislature should direct, 'so

that taxes shall be equal and uniform throughout the state,' and the statutes required that the real value of the property be adopted, and where as here, railroad property and some other kinds were valued by one set of officials, and property in general by another, without provision for equalization as between the two classes. The Court, by Circuit Judge Taft, said (p. 364): 'The sole and manifest purpose of the Constitution was to secure uniformity and equality of burden upon all the property in the state. As a means of doing so (conceding the defendant's construction is the correct one), it provided that the assessment should be according to its true value. It emphasized the object of the section by expressly providing that no species of property should be taxed higher than any other species. We have before us a case in which the complaining taxpayer, and other taxpayers owning the same species of property, are taxed at a higher rate than the owners of other species of property. This does not come about by legislative discrimination, but by the intentional and systematic disregard of the law by those charged with the duty of assessing all other species of property than that owned by complainant and its fellows of the same class. * * * (p. 365). The question presented is, then, whether when the sole object of an article of the Constitution is being flagrantly defeated, to the gross pecuniary injury of a class of litigants, and one of them appeals to a court of equity for relief, it must be withheld because the only mode of granting it will involve an apparent departure from the method marked out by the Constitution and the law for obtaining its sole object. We say 'apparent' departure from the constitutional method, because that instrument contemplated a system in which all property should be assessed at its real value. * * * The court is placed in a dilemma, from which it can only escape by taking that path

which, while it involves a nominal departure from the letter of the law, does injury to no one, and secures that uniformity of tax burden which was the sole end of the Constitution. To hold otherwise is to make the restrictions of the Constitution instruments for defeating the very purpose they were intended to subserve. It is to stick in the bark, and to be blind to the substance of things. It is to sacrifice justice to its incident."

In response to the argument that the conduct of administrative officers could not of itself be a violation of the Constitution of the United States, the court used the following language:

"The fact should be emphasized that the Kentucky court of last resort, far from holding that discrimination such as is here complained of is in accord with the Constitution and laws of the state, has recognized distinctly that it is not; but has felt constrained to hold that, under circumstances similar to those of the present cases, there is no redress in the courts of the state; and that the constitutional provisions for equality and uniformity are capable of being put into execution only through the selection of proper assessing officers. *Louisville R. Co. v. Com.* 105 Ky. 710, 719, 49 S. W. 486. This, while admitting the wrong, merely denies judicial relief, and is not binding upon the Federal Courts."

In response to the argument that the injured person could compel compliance with the law as to other persons, the court used the following language:

"It is contended that appellees, if aggrieved, had another and more equitable remedy than a suit for injunction; that the law of the state provides a method by which, instead of lowering the assessments upon the property of appellees, they

could by proper procedure compel the assessment of the property of other taxpayers to be increased so as to come within the constitutional requirement as to fair cash value, and hence that it was the duty of appellees to adopt that method. The reference is to Par. 4115-4120, Ky. Stat., which require the county board of supervisors to convene annually and make a careful examination of the assessor's books and each individual list thereof, empowering them to increase or decrease any list; 'but the board shall not reduce or raise any assessment unless the evidence be clear and unmistakable that the valuation is not a fair cash value.' By Par. 4123, they may hear complaints, summon and swear witnesses, and require them to testify. There is nothing in these provisions to indicate that parties in the situation of the present appellees, who have no different interest in the under valuation by the county assessors than that which might be possessed by any other citizen of the state, are entitled to be heard to complain that the county assessments are too low. Nor is any case cited where such a complaint has been entertained. The remedy of reassessment appears to be a public, not a private, remedy."

In the case of *Yick Wo. v. Hopkins*, 118 U. S. 356, 30 L. Ed. 220, the City of San Francisco passed an ordinance prohibiting the carrying on and operating of a laundry in frame buildings, except with the consent and permission of the local officer. The plaintiff in error and fellow countrymen, subjects of the Emporer of China, who had carried on their business for many years in the City, and desired to continue the same, though the permission was accorded to persons of other nationality, were denied the permission. The plaintiff in error appealed to the courts, asserting rights under the 14th Amendment to the Constitution of the United States, the equal protection of the law.

The Supreme Court of the United States held that in the administration of the law the rights of the plaintiff in error were denied, reversed the case, and used the following language:

> "When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play of action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration, the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights of life, liberty and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth 'may be government of laws and not of men.' For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the employment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself * * * *."

The Louisiana officers cannot justify themselves by the mere assertion that they had no knowledge thereof.

The evidence established, without contradiction, (1) that the dealers in New Orleans, Louisiana, knew that they could ship in unlimited quantities; (2) the carriers knew that they might with impunity transport them in unlimited quantities; (3) the purchasers in other states were actively advised that they could buy them in unlimited quantities. Therefore, the defendants in error will not be heard to say in any court that they had no knowledge thereof.

It is abundantly clear from this record that since the Act of 1910 had been stricken down because it prohibited the shipment of oysters to be canned, and in order to avoid the Act being declared invalid, and also in order to avoid the opposition of Louisiana dealers in these products, it was agreed that the Act should be so construed as not to apply to commercial shipments, not going to a factory to be packed or canned, and that such construction has been uniformly placed upon the Act; no effort made to inspect; no instructions given to the carriers not to transmit the commodity.

It would be violence to this record to hold other than that the defendants in error actually knew, and were responsible for, the construction placed upon the Act.

In the case of *McMillan v. Sims* (Wash) 225 Pac. 240, discrimination in the enforcement of the Fish Laws of the State of Washington was condemned in the following language:

> "Summarizing, appellants by their complaint prayed the right to present testimony to establish two facts pleaded:

"First, that they and the West Beach, West Shore, and Burroughs Bay trap owners are similarly situated, and that the fishing operations of each heretofore conducted and hereafter to be conducted have produced and will produce a similar effect, varying only in degree of prejudice and injury to the perpetuation of the salmon species, if any such effect can be found to exist in fact.

"Second, that no reason or necessity exists or has existed or will exist for closing the fishing in the waters where appellants' traps are located, but that instead complainants' combined business and industry can be maintained and continued in common with that of the West Beach, West Shore, and Burroughs Bay owners by the establishment of a certain closed weekly seasons, if in fact any preventive regulation is necessary.

"The demurrer, of course, admitted the truth of all the allegations well pleaded in the complaint. The only question, therefore, is whether those allegations sufficiently allege fraudulent, capricious, or arbitrary action on the part of the state fisheries board to warrant the relief sought.

"Respondents assert that the well-established principle in this state that the state owns all of the fish and game while in the state of nature, and in legislating in reference thereto simply legislates with reference to its own property, justifies such order as here made, relying on *State v. Tice*, 69 Wash. 403, 125 Pac. 168, 41 L. R. A. (N.S.) 469, and *Vail v. Seaborg*, 120 Wash. 136, 207 Pac. 15. Respondents then contend that there is a vital distinction between legislation affecting the privilege of taking fish and that affecting ordinary private businesses in which persons acquire vested rights.

"It is true that we held in *Vail v. Seaborg*, supra, that the present fisheries code could be upheld as valid and constitutional for the reason that the act was merely regulatory dealing with property belonging wholly to the people of the state; that the details of such relation merely were committed to the administrative officers. And we held in *State v. Tice*, supra, that there is no private right or privilege to take fish in waters of the state except as granted by the state, and that Laws of 1911, p. 456, regulating fishing for salmon, and making a different closed season in different waters of the state, was not unconstitutional or unreasonable, since it affected equally and impartially all persons similarly situated.

"But that is not the case here. The order here attacked does not affect equally and impartially all persons similarly situated, if the allegations of the complaint are true.

"An examination of a map of the waters in the locality in question discloses that the waters in question are all practically the same waters. They are alleged in the complaint to be so contiguous and closely interrelated that apparently the same conditions must exist in all. The schools of salmon seeking the entrance to Skagit river and its tributary streams must necessarily pass through the same waters and the same traps. Hence it would appear that the order of the fisheries board does not justly and impartially protect the fish in the waters seeking entrance to the fresh water streams of the state, but arbitrarily prohibits some from fishing in those waters, and permits others to fish. While it is true that the state may generally do with its own property what it will, no administrative board in carrying out the intent of the legislature by the fisheries act to protect the food fish of the state which is the property of the state can grant a privilege to

some and deny it to others similarly situated to take food fish. Such conduct is arbitrary and discriminatory. That that is the effect of the order complained of, if the allegations of the complaint are true, cannot be doubted.

"While the state fisheries board has very great powers under the act in question, which have been sustained in general by the decisions in our former cases cited, yet it is not omnipotent. The matter is affected with a very great public interest, and in dealing with the property of the state so affected by public interest the state fisheries board must not act arbitrarily and discriminatorily.

"All that is sought in this action, so far as we are now concerned, is to present facts to a trial court for the purpose of proving that no state of circumstances could exist to justify the rule complained of. While the board might adopt a rule prohibiting fishing in all the waters where these same schools of salmon run, to the end that the right to fish for the same should be taken away from all individuals, they have not the right to confer upon certain individuals and deny to others similarly situated the right to take fish upon the same conditions and terms."

In the case of *Buck v. Kuykendall*, 267 U. S. 317, 69 L. ed. 623, the Court used the following language:

"By motion to dismiss filed in this court, the state makes the further contention that Buck is estopped from seeking relief against the provisions of Sec. 4. The argument is this: Buck's claim is not that the department's action is unconstitutional because arbitrary or unreasonable. It is that Sec. 4 is unconstitutional because use of the highways for interstate commerce is denied unless the prescribed certificate shall have been secured. Buck applied

for a certificate. Thus he invoked the exercise of the power which he now assails. One who invokes the provisions of a law may not thereafter question its constitutionality. The argument is unsound. It is true that one cannot, in the same proceeding, both assail a statute and rely upon it. *Hurly v. Commission of Fisheries*, 257 U. S. 223, 225, 66 L. ed. 206, 207, 43 Sup. Ct. Rep. 83. Compare *Wall v. Parrot Silver & Copper Co.*, 244 U. S. 411, 61 L. ed. 1229, 1230, 37 Sup. Ct. Rep. 609. Nor can one who avails himself of the benefits conferred by a statute deny its validity. *Pierce Oil Corp. v. Phoenix Ref. Co.*, 259 U. S. 125, 66 L. ed. 855, 42 Sup. Ct. Rep. 440; *St, Louis Malleable Casting Co. v. George C. Pendergrast Constr. Co.* 260 U. S. 469, 472, 67 L. ed. 351, 354, 43 Sup. Ct. Rep. 178. But in the case at bar, Buck does not rely upon any provision of the statute assailed; and he has received no benefit under it. He was willing, if permitted to use the highways, to comply with all the laws relating to common carriers. But the permission sought was denied. The case presents no element of estoppel. Compare *Arizona ex rel. Gaines v. Copper Queen Consol. Min. Co.* 233 U. S. 87, 94, et seq., 58 L. ed. 863, 866, 34 Sup. Ct. Rep. 546."

In the case of the *State of Mississippi v. James Hill*, 53 South. 411, 31 L. R. A. (N.S.) 591, the Supreme Court of Mississippi held that the right to fish in waters of the state could not be limited to residents of the county.

In the case of *Gustafson v. State of Texas*, 43 L. R. A. 16, the Supreme Court of Texas held unconstitutional and discriminatory a statute which restricted the right of citizens to take fish from the waters of Texas unless licenses were obtained, and prohibited the issuance of licenses except to those who were taxpayers.

The same principle is applied in the case of *Nixon v. Herndon*, 273 U. S. 536, 71 L. ed. 759, wherein the court used the following language:

> "What is this but declaring that the law in the states shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the states, and, in regard to the colored race, for whose protection the Amendment was primarily designed, that no discrimination shall be made against them by law because of their color? Quoted from the last case in *Buchanan v. Warley*, 245 U. S. 60, 77, 62 L. ed. 149, 161, L. R. A. 1918C, 1201, 38 Sup. Ct. Rep. 16, Ann. Cas. 1918C, 1201. See *Yick Wo v. Hopkins*, 118 U. S. 356, 374, 30 L. ed. 220, 227, 6 Sup. Ct. Rep. 1064. The statute of Texas in the teeth of the prohibitions referred to assumes to forbid negroes to take part in a primary election the importance of which we have indicated, discriminating against them by the distinction of color alone. States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case."

In the case of *Manchester v. Mass.*, 139 U. S. 240, 35 L. ed. 159, in passing upon the right of the State of Massachusetts in the conservation of its natural resources to prevent fish being taken from the waters of the State, this court expressed doubt as to whether or not the State could discriminate between residents and non-residents.

In the very recent case of *Gong Lum v. G. P. Rice*, et al., decided November 21, 1927, ——U. S.——, 72 L. ed. 79, in passing upon the right of the State of Mississippi in denying a Chinese child the right to attend school provided for white children, your Honors were careful to predicate the announcement of the right of the State so to do upon the fact that there was no discrimination in the facilities used.

POINT V

SECTIONS 13 AND 19 OF THE SHRIMP ACT, AND SECTIONS 3, 23 AND 24 OF THE OYSTER ACT, AS ENFORCED AND CONSTRUED, VIOLATE THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

For all the reasons hereinbefore stated, we submit that the Acts in question, as enforced and construed, discriminate against interstate commerce, and place a direct burden thereupon. We refer, especially, to the Ferandeau Case, which so held.

POINT VI

SECTIONS 4, 13 AND 19 OF THE SHRIMP ACT, AND SECTIONS 3, 23 AND 24 OF THE OYSTER ACT, ARE IN CONTRAVENTION OF AND VIOLATE PARAGRAPH 1, SECTION 10, ARTICLE 1, OF THE CONSTITUTION OF THE UNITED STATES.

The proof established that Foster-Fountain Packing Company, Inc., plaintiff in error in Cause Number 768 was a Louisiana corporation, domiciled in New Orleans, Louisiana, and that its charter granted it the right to take, sell and export oysters from the State of Louisiana (Tr. 109). The same is true of the Sea Food Company, of Louisiana (Tr. 22). The limitation as to time of the operation of these charters has not expired, and we respectfully submit that such charters constitute contracts which could not be breached, and that the Acts in question have that effect, as to which we submit the following authoriies: *Russell v. Sebastian*, 233 U. S. 195, 58 L. ed 912; *Dartmouth College v. Woodward*, 4 Wheat. 518 4 L. ed. 629; *Miller v. People of N. Y.*, 15 Wall. 478, 21 L. ed. 98; *Chicago B. & Q. R. R. Co. v. Cutts, Attorney General*, et al, 94 U. S. 154, 24 L. ed. 94.

BRIEF ON BEHALF OF INTERVENING PETITIONERS

The record in-so-far as it affects these intervening petitioners shows the following:

1. That they are citizens of the State of Louisiana.

2. They are wholly dependent upon the oyster industry for a livelihood, knowing no other industry except a business which cannot support them.

3. They are prevented by the operation and effect of the law herein complained of from following their vocation in Louisiana.

4. While being denied, by the law complained of, of the right to fish and dispose of their oysters in Louisiana other citizens of Louisiana are granted this privilege. (record pages 29-30-31-32).

The only evidence before the court with respect to the above allegations in the bill of complaint was in full support of same (record page 84), and there was no material denial by the officials of the State of Louisiana of these allegations.

Therefore, we submit that these petitioners by the effect of the law complained of, particularly section 2 of said law, are denied the equal protection of the law in contravention of the Fourteenth Amendment to the Constitution of the United States, in that the said section 2 as enacted is as follows: "that the right to catch and take, can, pack, shuck, or deal in or transport oysters from the waters of this state * * * * * is hereby granted to any bona fide resident of this state, to any firm or association composed of citizens or residents of this state or to any corporation domiciled in or originated under the laws of this state, having their factories or shucking plants or places of business

located within this state"; and they are further denied the equal protection of the law in the construction placed upon this act by the governing authorities of Louisiana who allow other citizens and residents to ship oysters without restriction from the state of Louisiana in interstate commerce for the purpose of sale to restaurants, dining cars and domestic users, etc. (record page 32), and in support of this contention we with respect call the court's attention to the following.

That the right to fish in the state of Louisiana is vested in any of its citizens, the state having control of wild animal life only for the purpose of acting as a trustee for those who are entitled to use same and for the purpose of conserving and preventing the destruction of same. Forham on Waters and Water Rights, page 150 and 158, *Martin v. Waddell*, 16 Peters 348, *Smith v. Maryland*, 18 Powell 71, *Burns v. Crescent Gun & Rod Club*, 41 So. 249. In *Smith v. Maryland*, Mr. Chief Justice Curtis on page 74 speaking as the organ of the court said:

> "Whatever soil below low-water mark is the subject of exclusive propriety and ownership, belongs to the State, on whose maritime border, and within whose territory it lies, subject to any lawful grants of that soil by the State, or the sovereign power which governed its territory, before the declaration of independence. *Pollard Lessee v. Hagan*, 3rd. How. 212; *Martin v. Waddell*, 16 Peters, 367; *Den v. The Jersey Co.*, 15 How. 426.
>
> "But the soil is held by the State, not only subject to, *but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish*, as well shell as floating fist." *Martin v. Waddell*; *Den v. Jersey Co.*; *Corfield v. Coryell*, 4 Wash. R. 376; *Fleet v. Hagemen*, 14 Wend. 42; *Arnold v. Munday*, 1

Halst. 1; *Parker v. Cutler Milldam Corporation*, 2 Appleton (Me.) R. 353; *Peck v. Lockwood*, 5 Day, 22; *Weston et al v. Sampson, et al.* 8 Cush. 347. *The state holds the propriety of this soil for the conservation of the public rights of fishery thereon, and may regulate the modes of that enjoyment so as to prevent the destruction of the fishery. in other words, it may forbid all such acts as would render the public right less valuable, or destroy it altogether. This power results from the ownership of the soil, from the legislative jurisdiction of the state over it, and from its duty to preserve unimpaired those public uses for which the soil is held.*" (Italics ours)

And in the case of *Burns v. Crescent Gun & Rod Club*, 160 La. 1038, the point involved was the right of fishery in Irish Bayou, a navigable stream and Judge Breau, the organ of the court, said:

> "In the Acts for the admission of the States of Louisiana and Mississippi into the Union, it was declared that the River Mississippi and the navigable rivers and waters leading into the same or into the Gulf of Mexico shall be common highways and forever free." Act Feb. 20, 1811, c. 213, 32 Statute, 642.
>
> "The court enjoined any interference with the liberty of the residents of the State of fishery in Irish Bayou."

Therefore, a law which gives to a resident of a state and to certain corporations having factories, etc. in the state, the right to take fish or oysters from the waters of the state, but does not give this privilege to any citizen of that state is invalid. Citing *State of Mississippi v. Jim Hill*, 31 L. R. A. n.s. 491; *Charles Gustafson v. State of Texas*, 43 L. R. A. 16. In the latter case, Mr. Chief Justice Henderson, speaking for the court, said:

"In all the cases, so far as we are advised, it is held that navigable rivers and contiguous portions of the sea embraced within the territory belonging to the state, are the property of the state, that they belong to all the citizens thereof, and that every citizen has a right in common with every other citizen to take fish in such waters. (Authorities.) The last cited case (*Peck v. Lockwood*, 5 Bay. 22) was a case involving the right to take shell fish on land claimed by plaintiff. The facts were that plaintiff owned a tract of land fronting on the river, where the tide ebbed and flowed. At low tide the locus in quo was dry land, but, when the tide was in, it was covered by the flow of the sea. Plaintiff claimed proprietary rights in the locus in quo and defendant justified on the ground that at high water it was a part of the river or sea, and was open for the purpose of fishing, to all the citizens of the state. The court discussed a number of common-law authorities on the subject, and from them deduced the following: 'That the right to fish on the soil of another, when overflowed with the tide from the sea or arm of the sea, is a common right, though it flows on the soil of another.' As stated, however, there is no controversy on this point; that is, that the locus in quo in this case was the property of the state. Nor is it controverted that the state may properly regulate the use of all its property, but it is insisted that in granting privileges to use its public domain, whether of land or water, it must do so under the operation of the fundamental principle upon which our government is established, —that is, equality. All men when they form a social compact have equal rights and no man or set of men is entitled to exclusive separate public emolument or public services. Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed. Mr. Cooley says on this subject (Cooley, Const. Lim. p.

485.): 'Equality of rights, privileges and capacities unquestionably should be the aim of the law;' But it is contended here that the right to take the oysters in the public waters of the state is a privilege which the state can bestow as it pleases; that it can lease or let its public domain on whatever terms it sees fit. We cannot assent to this proposition. It might be so in a kingly government, but not in a free government in which all are equal before the law, * * * * * The state has no right to discriminate against any citizen or class of citizens as to the enjoyment of its public domain. The state has no more right to authorize one class of its citizens, to rent or use its public lands. We do not believe it could be seriously contended that the state could authorize only taxpayers to rent its public domain of lands, to the exclusion of another class of its citizens who were not taxpayers. This would not only be a discrimination, but discrimination in favor of the rich against the poor. If the state could authorize its citizens who were taxpayers to fish, and inhibit its citizens who were taxpayers from fishing in its public waters, it could equally authorize its citizens who were not taxpayers to fish in such waters to the exclusion of those who were taxpayers. * * * * * The fact that it is class legislation qualifies the act, or that provision of it authorizing the granting of a license, and so renders it unconstitutional and void. We hold that the waters of the state, as well as all its domain of public lands, are equally open to all of its citizens upon the same terms and conditions, and that the attempt of the legislature to prohibit residents of the state who are not taxpayers, but who are willing to pay license tax, from fishing in the public waters of the state, is violative of those provisions of the Constitution before mentioned."

We therefore with respect submit that the facts in this case justify a holding of the court that these petitioners were denied the equal protection of this law of Louisiana, both by the necessary effect of the law itself, as well as from the manner of the enforcement of the law by the officials of the state of Louisiana charged with its enforcement. These petitioners were citizens of Louisiana, and while they resided in Biloxi, Mississippi, temporarily, it was only because this was the only point from which they could pursue their chosen avocation of fishing. There is no denial in the evidence of the fact that they were forced to select this as a point from which to conduct their fishing operations, nor is there any denial of the fact that they could not have successfully disposed of their catch at any point other than Biloxi, yet, both from the necessary effect of the act which did not give the right of fishing to all citizens but conferred this right only on resident citizens while giving the same right to any citizen who formed an association or to any citizen that was a corporation, these men were denied the rights granted to others by the law. Furthermore, we call to the court's attention, that there was no specific denial, but only a denial in general terms of the allegation that other citizens, regardless of the act itself, were engaged in shipping oysters from the state for purposes other than of manufacture without the state. The necessary effect of this act on the part of these officials in so construing the law was to prevent the petitioners from earning a living, although allowing this right to other citizens, and even though the court might construe the act itself as giving to the petitioners the right to fish, although we respectfully submit that this act in itself would proclude them from fishing in Louisiana as long as they were residing in another state, the overwhelming proof in this case shows that in the administration of the law these petitioners were denied rights accorded to other citizens of this state and for this reason the enforcement of this law should be enjoined. *Yick Wo v. Hopkins*, 118 U. S. 356.

We further call to the court's attention the fact that to these petitioners the question involved is most vital. That is not only this so with reference to petitioners themselves, but the record in the case shows that over one thousand other French families are likewise situated in Biloxi, Mississippi. That these people have been engaged in fishing or in the cane industry for generations past. That to them the deprivation of either of these rights would be a tragedy. From the force and effect of a decree of nature, from which they cannot appeal, they had been deprived of the right of following the work of making and gathering cane. Of necessity, knowing no other occupation but that of fishing, and being unable to secure this employment in their home state, they departed from the fatherland that for over one hundred years has sheltered them, to take up a temporary residence on a point on the Mississippi Coast from which they could again go into their native state and earn a livelihood. The fact of their temporary residence in Biloxi deprives them of none of their rights as citizens. Speaking in the stockyards case this court said that one of the inalienable rights of mankind was to earn a living and to follow their chosen vocation. This was the right of these petitioners and certainly the last one to deny them this right should be the governing authorities of that state which has nurtured them and which has been the home of their forefathers for over a hundred years. They are not only by the law complained of and by the manner and method of its enforcement deprived of the right granted by law to other citizens of the state, but from the undisputed testimony the enforcement of this law will deprive them of their right to earn a livelihood, and while they are so deprived and are prevented, both from the law and from its enforcement, from fishing for oysters, from dealing in oysters, from packing of oysters and selling oysters and contracting with any one to sell oysters or to take oysters out of the state of Louisiana for sale, at the same time no effort of conservation is thereby sought by the authorities

of Louisiana, nor is the future permanency of her fishing industry increased by the operation of this law, nor are any of the citizens of the state furnished with a greater or more abundant food supply, but on the contrary, without limit or restriction, the other residents of the state qualifying under the statute can take advantage of all of these rights and can drain the natural resources of the state until there remains not a vestige thereof.

And in exchange for the absolute primary right of earning a living that is denied to these petitioners because of this law and its enforcement, the only benefit that will accrue to Louisiana will be the canning and packing of these oysters in the state of Louisiana, with the benefit that might come therefrom to a select class of citizens who are engaged in this business.

We therefore respectfully submit that this law deprives these petitioners of substantial rights and privileges granted to other citizens and that the reason for the enactment of this law or the manner of its enforcement is not a reasonable one intended for the protection either of other citizens of the state of Louisiana, or for the increase of any necessary food supply or natural resources belonging to the people of the state of Louisiana, but on the contrary, is an arbitrary, unreasonable classification looking towards the coercion of citizens to engage in a particular industry in Louisiana which will have no effect whatsoever on limiting the catch of oysters in the state of Louisiana, or increasing the value of the natural resources to the people of the state. See *State v. Ferrandeau*, 130 La. 1035; *Gulf, Colorado & Sante Fe R. R. v. Ellis*, 165 U. S. 150; *Cotting v. Goddard*, attorney general, 183 U. S. 79.

POINT VII
EQUITY HAS JURISDICTION BY INJUNCTION TO PREVENT IRREPARABLE INJURY AND DAMAGE.

In each of these causes, Numbers 768 and 769, contracts were made between the respective appellants for the sale and transportation in the one case shrimp, the other oysters, from the State of Louisiana to the State of Mississippi.

It is undisputed that the defendants in error had and maintained boats, patrolling the waters of the State of Louisiana along the line, preparatory to enforcing the Acts, and that unless restrained, if plaintiffs in error, or either of them, had made any effort, or taken any step, toward the consummation of the contracts, or either of them, they would have been arrested, imprisoned, and the vessels and equipment seized for confiscation.

The evidence even established that the defendants in error were so aggressive and alert in the enforcement of the respective Acts that they stationed an inspector at Biloxi, Mississippi, for the purpose of ascertaining as to whether or not shrimp or oysters were being brought into the State for the purpose of being packed or canned (Tr. 84-85).

The evidence established beyond contravention that if the plaintiffs in error without first obtaining a restraining order had taken any step looking toward the consummation of the contracts in question, that they, their agents and servants, would have been arrested, the boats seized, and that they would have been subjected to very heavy penalties; that each day would have constituted a separate offense; that the fines were doubled for a second offense, and long terms of imprisonment were permissible under the Acts, and doubtless would have been imposed, and their vessels

and equipment were subject to forfeiture. In other words, unless the plaintiffs in error were able to obtain a restraining order and a temporary injunction, it would have been impossible for them to execute the contracts, or either of them, and if they had been prevented from executing the contracts, the vendor in each of said contracts would have been denied the benefit accruing to him from the sale; that the plants and factories of the vendee would have been closed down, the property rendered valueless. In fact, the industry at Biloxi, Mississippi, would have been broken up, several thousands of persons thrown out of employment, and irreparable injury and damage inflicted. It was a case where the appellants could have no adequate remedy at law. Unless they were entitled to the restraining order and interlocutory injunction, they faced utter ruin. The jurisdiction of a court of equity in such cases has been so thoroughly established as to be beyond question. The case falls exactly within the rule announced in Ex Parte Young, 209 U. S. 123, 52 L. ed. 714.

In the case of *Truax v. Raich*, 239 U. S. 33, 60 L. ed. 131, the facts and law are stated as follows:

> "Mike Raich (the appellee), a native of Austria, and an inhabitant of the State of Arizona, but not a qualified elector, was employed as a cook by the appellant William Truax, Sr., in his restaurant in the City of Bisbee, Cochise County. Truax had nine employees, of whom seven were neither 'native born citizens' of the United States nor qualified electors. After the election at which the act was passed Raich was informed by his employer that when the law was proclaimed, and solely by reason of its requirements and because of the fear of the penalties that would be incurred in case of its violation, he would be discharged. Thereupon, on December 15, 1914, Raich filed this bill in the District Court of the United States

for the District of Arizona, asserting, among other things, that the act denied to him the equal protection of the laws, and hence was contrary to the Fourteenth Amendment of the Constitution of the United States. Wiley E. Jones, attorney general of the State, and W. G. Gilmore, the county attorney of Cochise County, were made defendants in addition to the employer Truax, upon the allegation that these officers would prosecute the employer unless he complied with its terms, and that in order to avoid such prosecution the emloyer was about to discharge the complainant. Averring that there was no adequate remedy at law, the bill sought a decree declaring the act to be unconstitutional and restraining action thereunder.

"Soon after the bill was filed, an application was made for an injunction pendente lite. After notice of this application, Truax was arrested for a violation of the act, upon a complaint prepared by one of the assistants in the office of the county attorney of Cochise County, and as it appeared that by reason of the determination of the officers to enforce the act, there was danger of the complainants immediate discharge from employment, the district judge granted a temporary restraining order.

"The allegations of the bill were not contraverted. The defendants joined in a motion to dismiss uuon the grounds (1) that the suit was against the State of Arizona without its consent; (2) that it was sought to enjoin the enforcement of a criminal statute; (3) that the bill did not state facts sufficient to constitute a cause of action in equity; and (4) that there was an improper joinder of parties, and the plaintiff was not entitled to sue for the relief asked. The application for an interlocutory injunction and the motion to dismiss were then heard before three judges, as required by Sec. 266 of the Judicial Code (36 Stat. at L.

1162, chap. 231, Com. Stat. 1913, Sec. 1243). The motion to dismiss was denied and an interlocutory injunction restraining the defendants, the attorney general and the county attorney, and their successors and assistants, from enforcing the act against the defendant Truax, was granted. 219 Fed. 273. This direct appeal has been taken.

"As the bill is framed upon the theory that the act is unconstitutional, and that the defendants, who are public officers concerned with the enforcement of the laws of the state, are about to proceed wrongfully to the complainant's injury through interference with his employment, it is established that the suit cannot be regarded as one against the state. Whatever doubt existed in this class of cases was removed by the decision in Ex parte Young, 209 U. S. 123, 155, 161, 52 L. Ed. 714, 727, 729, 13 L. R. A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764, which has repeatedly been followed. *Ludwig v. Western U. Teleg. Co.*, 216 U. S. 146, 54 L. Ed. 423, 30 Sup. Ct. Rep. 280; *Western U. Teleg. Co. v. Andrews*, 216 U. S. 165, 54 L. Ed. 430, 30 Sup. Ct. Rep. 286; *Herndon v. Chicago, R. I. & P. R. Co.*, 218 U. S. 135, 155, 54 L. Ed. 970, 976, 30 Sup. Ct. Rep. 633; *Hopkins v. Clemson Agri. College*, 221 U. S. 636, 643-645, 55 L. Ed. 890, 894, 895, 35 L. R. A. (N.S.) 243, 31 Sup. Ct. Rep. 654; *Philadelphia Co. v. Stimson*, 223 U. S. 607, 620, 56 L. Ed. 572, 576, 32 Sup. Ct. Rep. 340; *Home Teleg. & Teleg. Co. v. Los Angeles*, 227 U. S. 278, 293, 57 L. Ed. 510, 33 Sup. Ct. Rep. 312.

"It is also settled that while a court of equity generally speaking, has 'no jurisdiction over the prosecution, the punishment of the pardon of crimes or misdemeanors' (Re Sawyer, 124 U. S. 200, 210, 31 L. Ed. 402, 405, 8 Sup. Ct. Rep. 482), a distinction obtains, and equitable jurisdiction

exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecutions is essential to the safeguarding of rights of property. *Davis & F. Mfg. Co. v. Los Angeles*, 189 U. S. 208, 218, 47 L. Ed. 778, 780 23 Sup. Ct. Rep. 498; *Dobbins v. Los Angeles*, 195 U. S. 223, 241; 49 L. Ed. 169, 177, 25 Sup. Ct. Rep. 18; Ex Parte Young, supra; *Philadelphia Co. v. Stimson*, 223 U. S. 621, 56 L. Ed. 577, 32 Sup. Ct. Rep. 340. The right to earn a livelihood and continue in employment unmolested by efforts to enforce void enactments should similarly be entitled to protection in the absence of adequate remedy at law. It is said that the bill does not show an employment for a term, and that under an employment at will the complainant could be discharged at any time, for any reason, or for no reason, the motive of the employer being immaterial. The conclusion, however, that is sought to be drawn is too broad. The fact that the employment is at the will of the parties, respectively, does not make it one at the will of others. The employee has manifest interest in the freedom of the employer to exercise his judgment without legal interference or compulsion and, by the weight of authority, the unjustified interference of third persons is actionable although the employment is at will."

But this case cannot be distinguished from that of *Hennington v. Palmer*, 255 U. S. 100, 65 L. Ed. 528. The opinion of Mr. Justice White is in the following language:

"The appellants, dealers in wearing apparel in the City of Jackson, Mississippi, filed their bill in the court below against the attorney general and subordinates charged by him with administrative duties under Sec. 4 of the Lever Act, to enjoin the enforcement against them of provisions

of that section. Their right to relief was based upon averments as to the unconstitutionality of the assailed provisions of the section, not only in substance upon the contentions which we have this day considered and disposed of in the L. Cohen Grocery Co. case (255 U. S. 81, ante, 516, 14 A. L. R. 1045, 41 Sup. Ct. Rep. 298), but upon other grounds as well.

"Without passing upon the question of unconstitutionality, the court dismissed the bill for the reason that the complainants had an adequate remedy at law, and the correctness of the decree of dismissal is the question now before us on direct appeal.

"As it is no longer open to deny that the averments of unconstitutionality which are relied upon, if well founded, justified equitable relief under the bill, and because the opinion in the Cohen case has conclusively settled that they were well founded, it follows that the court below was wrong, and its decree must be and it is reversed, and the case remanded for further proceedings in conformity with this opinion."

In the case of *Terrance v. Thompson*, 263 U. S. 197, 60 L. Ed. 255, the facts are stated as follows:

"Appellants brought this suit to enjoin the attorney general of Washington from enforcing the Anti-alien Land Law of that state, Chapter 50, Laws 1921, on the ground that it is in conflict with the due process and equal protection clauses of the 14th Amendment; with the treaty between the United States and Japan (February 21, 1911, 37 Stat. at L. 1504); and with certain provisions of the Constitution of the State.

"The appellants are residents of Washington. The Terrances are citizens of the United States and of Washington. Nakatsuka was born in Japan, of Japanese parents, and is a subject of the Emperor of Japan. The Terrances are the owners of a tract of land in King County which is practically adapted to raising vegetables, and which, for a number of years, had been devoted to that and other agricultural purposes. The complainant alleges that Nakatsuka is a capable farmer and will be a desirable tenant of the land; that the Terrances desire to lease their land to him for the period of five years; that he desires to accept such lease, and that the lease would be made, but for the act complained of. And it is alleged that the defendant, as attorney general, has threatened to and will take steps to enforce the act against the appellants if they enter into such lease, and will treat the leasehold interest as forfeited to the state, and will prosecute the appellants criminally for violation of the act; that the act is so drastic and the penalties attached to its violation are so great that neither of the appellants may make the lease even to test the constitutionality of the act; and that unless the court shall determine its validity in this suit, the appellants will be compelled to submit to it, whether valid or invalid, and thereby will be deprived of their property without the process of law and denied the equal protection of the laws."

"The attorney general made a motion to dismiss the amended complaint upon the ground that it did not state any matters of equity or facts sufficient to entitle the appellants to relief. The district court granted the motion and entered a decree of dismissal on the merits. The case is here on appeal from that decree."

The law is stated as follows:

"The unconstitutionality of a state law is not, of itself, ground for equitable relief in the Courts of the United States. That a suit in equity does not lie where there is a plain, adequate and complete remedy at law is so well understood as not to require the citation of authorities. But the legal remedy must be complete, practical, and efficient as that which equity could afford. *Boise Artesian Hot & Cold Water Co. v. Boise City*, 213 U. S. 276, 281, 53 L. Ed. 796, 798, 29 Sup. Ct. Rep. 426; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 11, 12, 43 L. Ed. 341, 346, 347, 19 Sup. Ct. Rep. 77. Equity jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravenes the Federal Constitution wherever it is essential, in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable; and in such a case a person who, as an officer of the state, is clothed with the duty of enforcing its laws, and who threatens and is about to commence proceedings, either civil or criminal, to enforce such a law against parties affected, may be enjoined from such action by a Federal Court of Equity. *Kavanaugh v. Looney*, 248 U. S. 453, 456, 63 L. Ed. 354, 357, 39 Sup. Ct. Rep. 142; *Truax v. Raich*, 259 U. S. 33, 37, 38, 60 L. Ed. 131, 133, 134, L. R. A. 1916D, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283, see also Ex parte Young, 209 U. S. 123, 155, 162, 52 L. Ed. 714, 727, 730, 13 L. R. A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Adams & Tanner, 244 U. S. 590, 592, 61 L. Ed. 1336, 1341, L. R. A. 1917F, 1163, 37 Sup. Ct. Rep. 662, Ann. Cas. 1917D, 973; *Green v. Louisville & Interurban R. Co.* 244 U. S. 499, 506, 61 L. Ed. 1280, 37 Sup. Ct. Rep. 673, Ann. Cas. 1917E, 68; *Home Teleph & Teleg. Co. v. Los Angeles*, 227 U. S. 278, 293, 57 L. Ed. 510, 517, 33 Sup. Ct. Rep. 312; *Philadelphia Co. v. Stimson*, 223 U. S. 621, 56 L. Ed. 570, 577, 32

Sup. Ct. Rep. 340; *Western U. Teleg. Co. v. Andrews*, 216 U. S. 165, 54 L. Ed. 430, 30 Sup. Ct. Rep. 286; *Dobbins v. Los Angeles*, 195 U. S. 223, 241, 49 L. Ed. 169, 177, 25 Sup. Ct. Rep. 18; *Davis & F. Mfg. Co. v. Los Angeles*, 189 U. S. 207, 217, 47 L. Ed. 778, 780, 23 Sup. Ct. Rep. 498.

"The Terraces' property rights in the land include the right to use, lease and dispose of it for lawful purposes (*Buchanan v. Warley*, 245 U. S. 60, 74, 62 L. Ed. 140, 160, L. R. A. 1918C, 210, 38 Sup. Ct. Rep. 16, Ann. Cas. 1918A, 1201), and the Constitution protects these essential attributes of property (*Holden v. Hardy*, 169 U. S. 366, 391, 42 L. Ed. 780, 790, 18 Sup Ct. Rep. 383), and also protects Nakatsuka in his right to earn a livelihood by following the ordinary occupations of life (*Truax v. Raich*, 239 U. S. 33, 37, 38, 60 L. Ed. 131, 133, 134, L. R. A. 1916V, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283; *Meyer v. Nebraska*, 262 U. S. 390, 67 L. Ed. 1042, 29 A. L. R. 1446, 43 Sup. Ct. Rep. 625). If, as claimed, the state act is repugnant to the due process and equal protection clauses of the 14th Amendment, then its enforcement will deprive the owners of their rights to lease their land to Nakatsuka, and deprive him of his right to pursue the occupation of farmer, and the threat to enforce it constitutes a continuing unlawful restriction upon and infringement of the rights of appellants, as to which they have no remedy at law in equity. And assuming, as suggested by the attorney general, that, after the making of the lease, the validity of the law might be determined in proceedings to declare a forfeiture of the property to the state, or in criminal proceedings to punish the owners, it does not follow that they may not appeal to equity for relief. No action at law can be initiated against them until after the consummation of the proposed lease. The threatened enforcement of

the law deters them. In order to obtain a remedy at law, the owners, even if they would take the risk of fine, imprisonment and loss of property, must continue to suffer deprivation of their rights to dispose of or lease their land to any such alien until one is found who will join them in violating the terms of the enactment, and take the risk of forfeiture. Similarly, Nakatsuka must continue to be deprived of his rights to follow his occupation as farmer until a land owner is found who is willing to make a forbidden transfer of land and take the risk of punishment. The owners have an interest in the freedom of the alien, and he has an interest in their freedom to make the lease. The state act purports to operate directly upon the consummation of the proposed transaction between them, and the threat and purpose of the attorney general to enforce the punishments and forfeiture prescribed prevents each from dealing with the other. *Truax v. Raich*, 239 U. S. 33, 37, 39, 60 L. Ed. 131, 133, 134, L. R. A. 1916D, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283. They are not obliged to take the risk of prosecution, fines, and imprisonment and loss of property in order to secure an adjudication of their rights. The complaint presents a case in which equitable relief may be had, if the law complained of is shown to be in contravention of the Federal Constitution."

Another case directly in point is that of *Packard v. Banton*, 264 U. S. 140, 68 L. Ed. 596. The facts are stated as follows:

"This is a suit to enjoin the enforcement of a statute of New York (Laws 1922, chap. 612, p. 1566) alleged to be in contravention of the equal protection clauses of the Fourteenth Amendment. The statute requires every person, etc., engaged in the business of carrying passengers for hire in any motor vehicle, except street cars and motor vehicles subject to the Public Service Commission

Law, upon any public street in a city of the first class, to file with the state tax commission, either a personal bond with sureties, a corporate surety bond, or a policy of insurance in a solvent and responsible company in the sum of $2,500.00, conditioned for the payment of any judgment recovered against such person, etc. for death or injury caused in the operation or (by) the defective construction of such motor vehicle. The bill alleges that the rate of premium for the required policy is fixed by the insurance companies at $960.00; that the net income from the operation of the motor vehicle is about $35.00 a week, which would be reduced by the operation of the law to $16.50 per week, resulting in a confiscation of the earnings of appellant for the benefit of insurance companies. The state makes it a misdemeanor to operate such motor vehicles without having furnished the required bond or policy; and appellant avers that appellees, as prosecuting officers of the state, have threatened, and, if not enjoined, will proceed, to prosecute him, unless he complies with the law. The court below was constituted of three judges, under Sec. 266 of the Judicial Code, upon the return of the order to show cause a hearing was had, and the court denied a motion for an injunction pendente lite, and dismissed the bill for want of equity, without handing down an opinion."

The rule is announced as follows:

"Another preliminary contention is that the bill can not be sustained because there is a plain, adequate and complete remedy at law; that is, that the question may be tried and determined as fully in a criminal prosecution under the statute as in a suit of equity. The general rule undoubtedly is that a court of equity is without jurisdiction to restrain criminal proceedings unless they are instituted by a party to a suit already pending

before it, to try the same right that is in issue here. Re Sawyer, 124 U. S. 200, 209-211, 31 L. Ed. 402, 405, 406, 8 Sup. Ct. Rep. 486; *Davis & F. Mfg. Co. v. Los Angeles*, 189 U. S. 207, 217, 47 L. Ed. 778, 780, 23 Sup. Ct. Rep. 498.

"But it is settled that 'a distinction obtains and equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecution is essential to the safe-guarding of rights of property.' *Truax v. Raich*, 239 U. S. 33, 37, 38, 60 L. Ed. 131, 133, 134, L. R. A. 1916D, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283. The question has so recently been considered that we need do no more than cite *Terrace v. Thompson*, 263 U. S. 197, nate, 255, 44 Sup. Ct. Rep. 15, decided November 12, 1923, where the cases are collected and state our conclusion that the present suit falls within the exception and not the general rule. *Houston v. Des Moines*, 176 Iowa, 455, 464, 156 N. W. 883; *Dobbins v. Los Angeles*, 195 U. S. 223, 49 L. Ed. 169, 25 Sup. Ct. Rep. 18."

Other cases directly in point are:

Rhode Island v. Palmer, 252 U. S. 350, 64 L. Ed. 946, 40 Sup. Ct. Rep. 486; *Greene v. Frasier*, 253 U. S. 233, 64 L. Ed. 878, 40 Sup. Ct. Rep. 499; *Fort Smith & W. R. Co. v. Mills*, 253 U. S. 206, 64 L. Ed. 862, 40 Sup Ct. Rep. 526; *Hammer v. Dagenhart*, 247 U. S. 251, 62 L. Ed. 1101, 3 A. L. R. 649, 38 Sup. Ct. Rep. 529, Ann. Cas. 1918E, 724; *Wilson v. New*, 243 U. S. 332, 61 L. Ed. 755, L. R. A. 1917E, 938, 33 Sup. Ct. Rep. 298, Ann. Cas. 1918A, 1024; Ex parte Young, 209, U. S. 159, 52 L. Ed. 728, 13 L. R. A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; *Gegiow v. Uhl*, 239 U. S. 3, 60 L. Ed. 113, 36 Sup. Ct. Rep. 2; *Waite v. Macy*, 246 U. S. 606, 62 L. Ed. 892, 38 Sup. Ct. Rep. 395; *American School v. McAnnulty*, 187 U. S. 94, 47 L. Ed. 90, 23 Sup. Ct. Rep. 33; *Morrill v. Jones*, 106

U. S. 466, 27 L. Ed. 267, 1 Sup. Ct. Rep. 423; *Bacon v. Rutland R. Co.* 232 U. S. 134, 58 L. Ed. 538, 34 Sup. Ct. Rep. 283; *Detroit Creamery Co. v. Kinnane*, 264 Fed. 851; *Santa Fe P. R. Co. v. Lane*, 244 U. S. 492, 498, 61 L. Ed. 1275, 1280, 37 Sup. Ct. Rep. 714; *Philadelphia Co. v. Stimson*, 223 U. S. 605, 56 L. Ed. 570, 32 Sup. Ct. Rep. 340; *Truax v. Raich*, 239 U. S. 33, 60 L. Ed. 131, L. R. A. 1916D, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283.

In addition to the foregoing cases are the following cases, which are directly in point: *East v. VanDeman & Lewis Co.*, 240 U. S. 342, 60 L. ed. 679; *Tanner v. Little*, 240 U. S. 369, 60 L. ed. 691; *Pitney v. State of Washington*, 240 U. S. 387, 60 L. ed. 703; *Crane v. Johnson*, 242 U. S. 344, 61 L. ed. 352; *Hygrade Provision Co. v. Sherman*, 266 U. S. 495, 69 L. ed. 402; *Banton v. Belt Line Ry. Corp.*, 268 U. S. 411, 69 L. ed. 1020.

One of the most recent cases upon the subject is that of *Cline v. Frink Dairy co.*, 274 U. S. 445, 71 L. ed. 1146, in which the Court used the following language:

> "The first question is whether the practice and precedents in equity justified the granting of relief by injunction where one criminal prosecution had been begun and where many others, together with suits for fordeiture of corporate franchises, were threatened. The general rule is that a court of equity is without jurisdiction to restrain criminal proceedings to try the same right that is in issue before it; but an exception to this rule exists when the prevention of such prosecutions under alleged unconstitutional enactments is essential to the safeguarding of rights of property, and when the circumstances are exceptional and the danger of irreparable loss is both great and immediate. *Fenner v. Boykin*, 271 U. S. 240, 243, 70 L. ed. 927, 46 Sup. Ct. Rep. 492; *Packard v. Banton*, 264 U. S. 140, 68 L. ed. 596, 44 Sup. Ct. Rep. 257; *Hygrade Provision Co. v. Sherman*, 266 U. S.

497, 502, 69 L. ed. 402, 407, 45 Sup. Ct. Rep. 141; *Terrace v. Thompson*, 263 U. S. 197, 214, 68 L. ed. 255, 273, 44 Sup. Ct. Rep. 15; Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L. R. A. (N. S. 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; *Davis & F. Mfg. Co. v. Los Angeles*, 189 U. S. 207, 218, 47 L. ed. 778, 780, 23 Sup. Ct. Rep. 498; *Dobbins v. Los Angeles*, 195 U. S. X223 236, 241, 49 L. ed. 169, 175, 177, 25 Sup. Ct. Rep. 18; Re Sawyer, 124 U. S. 200, 209, 211, 31 L. ed. 402, 405, 406, 8 Sup.Ct. Rep. 482.

"The affidavits in support of the bill were full in their showing that the district attorney by his action and threats had already greatly injured their properties and their business. They present a case in which the question of the validity of the act under which, if invalid, great injuries to properties and businesses are being unjustly inflicted should be promptly settled. We think the basis for equitable jurisdiction is made sufficiently clear. It is objected, however, that the injunction cannot be supported under the authorities, in so far as it is directed against actual proceedings pending in criminal court. One of the district judges below dissented from this part of the decree. Of course, the injunction is not only against actual prosecution but is also against a multiplicity of future suits and the threatened proceedings for forfeiture, by which the attorney general proposes to end the business of all the plaintiffs, and the objection would only lead to a narrowing of the decree. The majority in the district court were influenced by a remark of this court in *Davis & F. Mfg. Co. v. Los Angeles*, 189 U. S. 207, 218, 47 L. ed. 778, 780, 23 Sup. Ct. Rep. 498, in speaking of a bill to restrain invasion of rights of property by the enforcement of an unconstitutional law, in which the court said:

" 'It would seem that if there were jurisdiction in a court of equity to enjoin the invasion of property rights through the instrumentality of an unconstitutional law, that jurisdiction would not be ousted by the fact that the state had chosen to assert its power to enforce such law by indictment or other criminal proceeding.'

"This semble does not seem to have received the approval of the court in Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L. R. A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764, where it was said:

" 'It is further objected (and the objection really forms part of the contention that the state cannot be sued) that a court of equity has no jurisdiction to enjoin criminal proceedings, by indictment, or otherwise, under the state law. This, as a general rule, is true. But there are exceptions. When such indictment or proceeding is brought to enforce an alleged unconstitutional statute, which is the subject matter of inquiry in a suit already pending in a Federal court, the latter court having first obtained jurisdiction over the subject-matter, has the right, in both civil and criminal cases, to hold and maintain such jurisdiction, to the exclusion of all other courts, until its duty is fully performed. *Prout v. Starr*, 188 U. S. 537, 544, 47 L. ed. 584, 587, 23 Sup. Ct. Rep. 398. But the Federal court cannot, of course, interfere in a case where the proceedings were already pending in a state court. *Taylor v. Taintor*, 16 Wall. 366, 370, 21 L. ed. 278, 290, *Harkrader v. Wadley*, 172 U. S. 148, 43 L. ed. 399, 19 Sup. Ct. Rep. 119.'

"We, therefore, agree with the view of the dissenting judge that the injunction is too broad, in so far as it restrains proceedings actually pending, and that it must be accordingly modified."

This case falls within the rule announced in the foregoing cases.

The appellants not only were interested in the purchase, sale and transportation of the shrimp and oysters covered by the particular contracts shown in the record, but such sale and transportation formed a regular current of interstate commerce from the State of Louisiana to the State of Mississippi. They were prevented from executing such contracts by the defendants in error, and the entire movement of shrimp and oysters in such interstate commerce was directly interfered with. The appellants could not safely violate the law; they were subject to arrest for each separate offense, and were liable to very severe punishment, themselves, their agents and servants, and their property engaged in interstate commerce subject to confiscation. Without the temporary restraining order issued in the case they would either have had to desist from executing the contracts in question or submit themselves to the irreparable injury of frequent recurring arrest and the frequent recurring seizures of their property. We respectfully submit that the cases fall within the rule announced justifying equitable interference by injunction against the enforcement of the statutes of the State of Louisiana involved in this case.

It necessarily follows that if the statutes are unconstitutional in any of the particulars hereinbefore referred to no question of discretion in granting the interlocutory decree was involved. The interlocutory injunctions, as a matter of right, should have been granted. Such are the holdings of the foregoing cases.

When it comes to the question of the unconstitutionality of the statutes based on the alleged discriminatory enforcement thereof, we have endeavored to show the Court that there was no substantial disputed facts in respect thereto, and we now affirm that position.

That being true, and our position being correct under the authorities hereinbefore set out, the appellants were entitled as a matter of law to the interlocutory injunctions on account of the discriminatory construction placed by the defendants in error in the enforcement upon the statutes.

We refer the Court to the very recent case of *City of Hammond v. Schappi Bus Line*, decided by this Court November 21, 1927 ———U. S. ———, 72 L. ed. 56. In that case, the Court announced the rule, as we understand the opinion, that on an application for an interlocutory injunction on the grounds that a municipal ordinance was a burden upon interstate commerce, or was discriminatory, that where there was presented a serious question of restraint of interstate commerce, or where the affidavits conflicted in respect to discrimination, and there was no finding of fact made as to the fact of actual discrimination, and it further appeared that the complainant would sustain irreparable harm and damage, the interlocutory injunction should issue pending the final hearing of the case. The court used the following language:

> "The contentions made in the briefs and arguments suggest, among other questions, the following: Where there is congestion of the city streets sufficient to justify some limitation of the number of motor vehicles to be operated thereon as common carriers, or some prohibition of stops to load or unload passengers, may the limitation or prohibition be applied to some vehicles used wholly or partly in interstate commerce while, at the same time, vehicles of like character, including many that are engaged solely in local, or interstate, commerce are not subjected thereto? Is the right in the premises to which interstate carriers would otherwise be entitled, affected by the fact that prior to the establishment of the interstate lines, the city had granted to a local carrier, by

contract or franchise, the unlimited right to use all the streets of the city, and that elimination of the interstate vehicles would put an end to the congestion experienced? May the city's right to limit the number of vehicles, and prohibit stops to load or unload passengers, be exercised in such a way as to allocate streets on which motor traffic is more profitable exclusively to the local lines and to allocate streets on which the traffic is less profitable to the lines engaged wholly, or partly, in interstate commerce? Is limitation of the number of vehicles, or prohibition of stops to load or unload passengers, of carriers engaged wholly, or partly, in interstate commerce, justifiable, where the congestion could be obviated by denying to private carriers existing parking privileges or by curtailing those so enjoyed? Are the rights of the interstate carrier in the premises dependent, in any respect, upon the dates of the establishment of its lines, as compared with the dates of the establishment of the lines of the local carrier?

"These questions have not, so far as appears, been considered by either of the lower courts. The facts essential to their determination have not been found by either court. And the evidence in the record is not of, such a character that findings could now be made with confidence. The answer denied many of the material allegations of the bill. The evidence consists of affidavits and the pleadings. The pleadings are confusing. The affidavits are silent as to some facts of legal significance; lack definitemess as to some matters; and present serious conflicts on issues of facts that may be decisive. For aught that appears, the lower courts may have differed in their decisions solely because they differed as to conclusions of fact. Before any of the questions suggested, which are both novel and far-reaching in importance, are passed upon

by this court, the facts essential to their decision should be definitely found by the lower courts upon adequate evidence.

"There is an added reason why this court should not now make the findings of fact or rulings of law involved in these contentions. The court of appeals erred in assuming, as its opinion discloses, that the case had been submitted below as upon final hearing; and that the appeal before it was from a final decree dismissing the bill. The appeal was from the interlocutory decree denying the preliminary injunction; and the record discloses no later proceedings in the district court. The case was not yet ripe for final disposition by the Court of Appeals. Compare *Eagle Glass & Mfg. Co. v. Rowe*, 245 U. S. 275, 283, 62 L. ed. 286, 290, 38 Sup. Ct. Rep. 80. Findings and rulings if now made on the basis of the evidence presented at the hearing on the application for the temporary injunction, might be rendered of no avail by the presentation of other or additional evidence when the case comes on for final hearing.

"Under these circumstances, we deem it proper that, without costs in this court to either party, the decree of the Circuit Court of Appeals be modified by recognizing that the decree in the district court was only interlocutory, by directing an injunction pending the suit, and by remanding the case to the district court for proceedings on final hearing, with liberty to that court, among other things, to allow amendment of the pleadings."

Upon the question of discrimination it was not possible for the appellants fully to present their case by affidavits. They had no way to compel persons with relevant information to make an affidavit; they had no way to compel the express company to disclose the transportation of shrimp and oysters in the shells

passing beyond the state. We respectfully submit, however, that the affidavits offered by appellants in respect to the alleged discrimination in the enforcement of the act and the discriminatory construction placed thereupon, which amounted to a deprivation of appellants' constitutional rights, were sufficient to make out a prima facie case, and the interlocutory injunction should have been granted if there existed no other ground than the discriminatory construction placed upon the statute by the defendants in error charged with the enforcement thereof.

The three judge court in each case found that the plaintiffs in error would sustain irreparable harm, injury and damage, unless the status quo was preserved on appeal. No harm could be sustained by the State of Louisiana. The plaintiffs in error offered in their bill to pay every particle of the tax required by the laws of the State of Louisiana; they offered to comply with every portion of the law being purely conservatory; therefore, in view of the fact that the statutes of the state of Louisiana under review expressly authorized all shrimp and oysters to be shipped out of the state in unlimited quantities, without restriction or reservation, the only possible damage which the State of Louisiana could sustain would be the loss of taxes. The plaintiffs in error have not only offered to pay these taxes, but they have offered, and offer now, to impound them, in any court, and, in addition thereto, have given bonds for the faithful payment thereof.

As above stated, if your Honors agree with us in our construction of the Acts, and agree with us that the Acts do, in the particulars hereinbefore set out, burden interstate commerce, or deprive the appellants of any constitutional right asserted, then, as a matter of law, they are entitled to the interlocutory injunction. If, however, the rights of the plaintiffs in error should be held to depend entirely upon the question of the

discriminatory construction placed thereupon by defendants in error, even in that event, under the proof in this case, it was abuse of discretion on the part of the three judge court to refuse to grant the interlocutory injunction.

In the case of *Fordson Coal Co. v. Maggard*, C. C. A. (6th Cir.) 2 Fed. 708, the court held that sound discretion usually requires temporary injunction where irreparable damage shown and defendant can be protected by bond.

In the case of *City of Council Bluffs v. Railway Co.*, C. C. A. 9 Fed. 246, the court held that an interlocutory injunction should be granted where questions of law or fact are difficult, and injury to moving party irreparable if denied. In that case the court said:

> "Third. If the questions of law or fact presented to the court of original jurisdiction in a suit for an injunction are grave and difficult, and the injury to the moving party will be certain, great and irreparable, if the motion for the interlocutory injunction is denied, and the final decision is in his favor, while, if the decision is otherwise, and the injunction is granted, the inconvenience and loss to the opposing party will be inconsiderable, or probably may be indemnified by bond, the injunction usually should be granted. *Blount v. Societe Anonyme du Filtre, etc.*, 53 F. 98, 101, 3 C. C. A. 455; *Love v. Atchison, T. & S. F. Ry. Co.*, 185 F. 321, 332, 107 C. C. A. 403; and cases there cited; *American Smelting & R. R. Co. v. Bunker Hill & S. Min. Co.* (D.C.) 248 F. 172, 182; *Chew v. First Presbyterian Church* (D.C.) 237 F. 219, 222; *Magruder v. Belle Fourche Valley Water*

Users' Ass'n., 219 F. 72, 82, 135 C. C. A. 524; *Wilmington City Ry. Co. v. Taylor* (D.C.) 198 F. 159, 197, 198; *Carpenter v. Knollwood Cemetery et al* (CC) 188 F. 856, 857."

In the case of *Continuous Glass Co. v. Schmertz Glass Co.*, C. C. A., 153 Fed. 577, the court held that while a preliminary injunction is to be cautiously used by a court of equity, it should not be withheld if, in the exercise of sound discretion, it is deemed necessary to prevent injustice.

In the case of *Bushkirk v. King*, C. C. A., 72 Fed. 22, it is held that where an injunction is sought merely to preserve the status quo pending an action of ejectment by restraining defendant from cutting timber, plaintiff is not required to make out such a case as will entitle him to a decree on final hearing, and it may happen that an injunction is properly granted although the ultimate relief sought is finally denied.

In the case of *Samson-Murdock Co. v. Seaver*, 129 Fed. 761, the court held that on an application for an injunction pendente lite the court should consider the effect on both parties of the granting or refusal of the order, and where it appears that in either case great or irreparable injury will result to one or the other, the court will take the course which seems most conducive to justice to both parties.

In the case of *Wilmington Ry. Co. v. Taylor*, 198 Fed. 159, the following rule was announced:

> "On the point of equitable in contradistinction to legal relief there can be no question. The complainants are not obliged to wait for an indefinite period in order to obtain defensive relief in actions which may be brought in the state court for the recovery of the penalty of one hundred dollars per day, even if they could successfully defend without

first having had the order complained of declared invalid. They are entitled to the protection of this court against the enforcement of that order and their remedy is properly and, indeed, necessarily, in equity for injunctive relief. There is nothing for which the complainants could here maintain an action at law. It is not a question whether equity furnishes a more convenient remedy. It gives the only remedy, there being no legal remedy whatever in this court under the circumstances.

"On the question of the circumstances determinative of the propriety of granting or withholding preliminary injunctions there are certain well settled principles. The granting or refusal of a preliminary injunction, whether mandatory or preventive, calls for the exercise of a sound judicial discretion in view of all the circumstances of the particular case. Regard should be had to the nature of the controversy, the object for which the injunction is sought, and the comparative hardship or convenience to the respective parties involved in the awarding or denial of the injunction. The legitimate object of a preliminary injunction preventive in its nature, is the preservation of the property or rights in controversy until the decision of the case on a full and final hearing upon the merits, or the dismissal of the bill for want of jurisdiction or other sufficient cause. The injunction is merely provisional. It does not, in a legal sense, finally conclude the rights of the parties, whatever may be its practical operation under exceptional circumstances. In a doubtful case, where the granting of the injunction would, on the assumption that the defendant ultimately will prevail, cause greater detriment to him than would, on the contrary assumption, be suffered by the complainant, through its refusal, the injunction usually should be denied. But where, in a doubtful case, the denial of the in-

junction would, on the assumption that the complainant ultimately will prevail, result in greater detriment to him than would, on the contrary assumption be sustained by the defendant through its allowance, the injunction usually should be granted. The balance of convenience or hardship ordinarily is a factor of controlling importance in cases of substantial doubt existing at the time of granting or refusing the preliminary injunction. Such doubt may relate either to the facts or to the law of the case, or to both. It may equally attach to or widely vary in degree as between the showing of the complainant and that of the defendant, without necessarily being determinative of the propriety of allowing or denying the injunction. Where, for instance, the effect of the injunction would be disastrous to an established and legitimate business through its destruction or interruption in whole or in part strong and convincing proof of right on the part of the complainant and of the urgency of his case is necessary to justify an exercise of the injunctive power. Where, however, the sole object for which an injunction is sought, is the protection of property or legitimate business, or the maintenance of the status quo, until the question of right between the parties can be decided on final hearing, the injunction properly may be allowed, even though there be serious doubt of the ultimate success of the complainant. There is abundant authority in support of these views. *Russel v. Farley*, 105 U. S. 433, 438, 26 L. ed. 1060; *City of Newton v. Levis*, 79 Fed. 715, 25 C. C. A. 161; *Glasscot v. Lang*, 3 Myl. & C. 451, 455; *Hadden v. Dooley*, 74 Fed. 429, 431, 20 C. C. A. 494; *Great Western R. Co. v. Birmingham, etc. R. Co.* 2 Phil. Chan. 597; *Shrewsbury & Chester R. Co. v. Shrewbury R. Co.*, 1 Sim. N.S. 410, 426, 427, 432; *Denver & R. G. Co. v. United States*, 124 Fed. 156, 59 C. C. A. 579; *Buskirk v. King*, 72 Fed. 22, 18 C. C. A.

418; *Sanitary Reduction Works v. California Reduction Co.* (C.C.) 94 Fed. 693; *Southern Pac. R. Co. v. Earl*, 82 Fed. 690, 27 C. C. A. 185; *New Memphis Gas & Light Co. v. Memphis* (C.C.) 72 Fed. 952; *Indianapolis Gas Co. v. Indianapolis* (C.C.) 82 Fed. 245; *Georgia v. Brailsford*, 2 Dall. 402, 1 L. ed. 433. The application of these principles to the case in hand not only justifies but requires the awarding of the injunction. The only evidence before the court, aside from the bill and its exhibits, consists of exparte affidavits, which are inconclusive and to a certain extent conflicting on material points. The evidence, such as it is, preponderates on the side of the complainants. But the case is not ripe for final decision, and to render one now would be both premature and improper. A final decision should be reached only after a thorough, orderly and rigid investigation of the facts, in connection with the law, so conducted as to allow the application of the usual and most satisfactory test of truth, namely, the examination, cross examination and re-examination of witnesses, and also the production of books, papers and accounts. Further, the 'balance of convenience or hardship' here operates in favor of the complainants. While the granting of a preliminary injunction will temporarily require those to pay 'a straight five cent fare' who would prefer to save five-sixths of a cent on each fare by purchasing six tickets for twenty-five cents, the refusal of such injunction might seriously embarrass and possibly prove disastrous to the established business and property of the traction company. An interlocutory decree for a preliminary injunction may be prepared and submitted."

We respectfully submit that the three judge court committed error in failing and refusing to grant the temporary injunction pending the hearing of this cause.

In conclusion, we desire to state that the largest saw mill in the world is located in Louisiana, just south of the Mississippi line; that one of the largest paper mills in the world is in the same locality; both of these industrial plants draw their raw material a distance of nearly two hundred miles from under the shadow of the capitol of the State of Mississippi; they cannot operate twenty-four hours without the raw product from the State of Mississippi. If any one wanted to measure the commercial prosperity of Mississippi, it would not be necessary to examine the Mississippi banks or institutions; the State's barometer of commercial progress and prosperity will be found registering itself in the banks of the City of New Orleans. The cotton and the other raw materials from the State, in well-defined and long existing channels of commerce, flow into Louisiana, just as its streams pour into the ocean. The only raw product coming to Mississippi from Louisiana are the shrimp and oysters. Acts of this kind destroy that mutual feeling of good will which ought to exist between the people of two states; they invite retaliatory legislation; it cannot be doubted but that they restrain interstate commerce. The question presented is as to which rises the highest, that of the State of Louisiana to say where its natural resources passing into interstate commerce shall be manufactured, or the right of Congress, unhampered by state laws, to regulate interstate commerce.

We respectfully submit that the three judge court erred in the particulars hereinbefore set out; that the interlocutory order should have been granted in each case, and that the decrees appealed from should be reversed.

Respectfully submitted,
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ACT NO. 258 OF 1926

AN ACT

To declare all oysters and parts thereof in the waters of the State to be the property of the State of Louisiana, and to provide the manner and extent of their reduction to private ownership; to encourage, protect, conserve, regulate and develop the Oyster industry of the State of Louisiana, to provide penalties for violations of the provisions of this Act and to repeal all laws in conflict herewith.

Section 1. Be it enacted by the Legislature of Louisiana, That all beds and bottom of rivers, streams, bayous, lagoons, lakes, bays, sounds and inlets bordering on, or connecting with the Gulf of Mexico, in this State, and that part of the waters of the Gulf of Mexico, within the territorial jurisdiction of the State of Louisiana, including all oysters and other shell fish and parts thereof, grown thereon, either naturally or cultivated, and all oysters in the shells after the same shall have been caught or taken therefrom, shall be, continue and remain, the property of the State of Louisiana, until the title thereto shall be divested in the manner and from herein authorized; and shall be under the exclusive control of the Department of Conservation of the State of Louisiana until the right of private ownership shall vest therein as herein provided.

Nothing in this Act shall be so construed as affecting in any way the leasing of said waters for mineral purposes under the provisions of Act No. 30 of the Legislature of 1915, providing that if the mineral rights on any water bottom previously leased for oyster culture are granted by the State it shall be done only with the written consent previously obtained of the lessee of such water bottoms for oyster culture purposes, or by previous compensation of adequate amount paid to said oyster lessee by said mineral lessee for any and all damages sustained by said oyster lessee.

No grant, sale or conveyance of the lands forming the bottoms of water shall hereafter be made by the Register of the State Land Office, or by any other official, or by any subordinate political corporation. The rights of the owners or occupants of lands on the shores of any of the waters hereinbefore described shall extend to the ordinary low mark only and no one shall own in fee simple any bottoms of lands, covering the bottoms of water hereinbefore described.

Section 2. That the right to catch and take, can, pack, shuck or deal in or transport oysters from the waters of this State, and the right to lease bedding grounds for the cultivation and propagation of oysters for any of said purposes within any waters within the territorial jurisdiction of the State is hereby granted to any bona fide resident of this State, to any firm or association composed of citizens or residents of this State, or to any corporation domiciled in, or organized under the laws of this State, having their factory or shucking plant or places of business located within the State, upon the terms and conditions and subject to the restrictions and regulations herein set forth, or under the authority of which may be imposed by the Department of Conservation of this State. No person, firm, association or corporation, not a resident of or domiciled in this State is, or shall be, permitted to catch, take, can, pack, shuck, deal in or transport any oysters taken from the waters of this State, or lease any bedding grounds for the cultivation and propagation of oysters for any of the above purposes. Any person, firm, association or corporation, violating any of the provisions of this section shall be liable to the penalties hereinafter provided. Any person, firm, or corporation, properly licensed to operate in the oyster industry in this State shall be permitted to employ such labor, resident or non-resident, as may be required and to employ such vessels and their crew, resident or non-resident, as may be required upon said vessels being properly licensed as hereinotherwise provided. This right to employ such non-resident labor or non-resident vessels shall be confined to the operation of any licensees as carried on within the State of Louisiana.

Section 3. That it shall be unlawful for any person, firm or association, or corporation to ship beyond the limits of this State any oysters, caught or taken from the waters of this State, while the same are in the shells, or to export from this State any raw oyster shells. Such oyster shells are hereby declared to be the property of the State as one of its natural resources, necessary for use as cultch in the propagation and development of the oyster industry in the State in order that a valuable food supply for its citizens may be conserved and developed. Any surplus of raw oyster shells beyond the foregoing requirements may be used for road building purposes, or ground for use as chicken feed or fertilizer, or any other purposes of material benefit to the State or to its citizens. In order that all of the inhabitants of the State of Louisiana may enjoy the State's natural food product it shall be lawful to ship in the shell oysters from any point in the State of Louisiana to any other point in the State of Louisiana for consumption, subject to such regulations and restrictions as may be imposed by the Department of Conservation. Any person, firm or corporation of this State, who shall lawfully take any oysters from any of the waters of this State, or lawfully acquire the same, shall have a qualified interest or property in the oysters so taken in the shells, which qualified interest may be sold or transferred to any other person, firm or corporation within the limits of the State of Louisiana; and after said oysters shall have been removed from the shell, within the State of Louisiana, such lawful taker or possessor, his heirs or assigns, as the case may be, shall be vested with all of the rights and property of the State in and to said oysters and shall have the right to sell such oysters or ship the same beyond the limits of the State, without restriction or reservation, and when the raw oyster shells herein described shall have been used for the purposes herein stated the right of property therein theretofore existing in the State shall pass to the lawful taker or then possess of such oyster shells.

In case of any infringment of the aforesaid qualified interests in the taker or possessor of oysters in the shell, said taker or possessor may, in his own name, maintain his action against

the wrongdoer, as may be proper; and in case of larceny or other public offense concerning such oysters while in the hands of a lawful taker or possessor, or upon bedding grounds held by a lawful lessee, the ownership thereof shall be averred in such lessee, taker or possessor, when by law it is necessary to aver ownership. Any person, firm, association or corporation violating any of the provisions of this section shall be liable to the penalties hereinafter provided.

Section 4. That the Department of Conservation shall have the power to lease to any resident, any firm composed of residents of this state, or to any corporation domiciled in or organized under the laws of this State, any and all water bottoms and natural reefs in the waters of this State, under the limitations herein stipulated.

No claim to any water bottoms, suitable for oyster culture, by any person, firm or corporation shall be valid or have any effect until adjudicated upon by a court of competent jurisdiction in a suit between the State and the claimant, and said claimant by virtue hereof may institute suit against the State in any Court of competent jurisdiction for the legal determination of the validity of his, their or its claim, without the necessity of a special legislative Act, authorizing such suit; and the effect of such judgment shall be limited to an adjudication of the question of title.

All leases of bedding grounds lawfully made in pursuance of any former statute or statutes, of the State of Louisiana heretofore enacted for the encouragement, protection, regulation and development of the oyster industry in this State, shall continue in full force and effect up to their expirations, provided the several leessees shall respectively pay the Department of Conservation, the rentals provided by law, and subject themselves to the regulations imposed by said Department; and all renewals of said leases, when made, shall stipulate as a matter of contract that the lessees will faithfully and fully comply with all of the provisions of this Act, and any and all amendments thereto and all rules and regulations which may be enacted thereunder by the Department of Conservation.

The owners of expiring leases shall have first right of renewal of their leases.

Section 5. That any firm, person or corporation, otherwise authorized herein so to do, desiring to lease a part of the bottom or bed of any of the waters of this State as provided herein, shall present to the Depatment of Conservation, a written application, together with a cash deposit of such amount as may be determined by the Department of Conservation, setting forth the name and address of the applicant, a reasonably definite description of the location and amount of land covered by water desired by the applicant and shall ask that the application be registered, that the water bottom be surveyed, that a plan or map of survey thereof be made and that the water bottom described be leased to applicant under the provisions of this Act. Thereupon the Department of Conservation shall register said application and shall order an examination to determine whether the bottoms applied for are leaseable or not, and the basis whereon the rental thereof shall be fixed. Should such area be found to be leaseable, a survey and plan shall be made at the expense of the applicant, at a fee to be fixed by the Department of Conservation. Said expense shall be paid by applicant to the surveyor in compensation for his services of making the survey, at the time when the survey is made. When applications are made by two or more persons for the same water bottoms, the applicant who files the first application shall have prior claim. The Department of Conservation shall require the bottoms of water areas leased to be as compact as possible, taking into consideration the shape of the body of water and the condition of the bottom, as to hardness or soft mud, which would render them desirable or undesirable for the purpose of oyster cultivation.

That in the event said application shall be favorably acted upon, and as soon as the survey has been made, the plan or map thereof filed with the Department of Conservation and the costs thereof paid by the applicant, the Department of Conservation may, at its option, execute a lease for such water bottoms to the applicant therefor at the rate of rental fixed by the Department of Conservation.

All leases made under the provisions of this Act shall stipulate as a matter of contract that the lessee will faithfully and fully comply with all the provisions of this Act and with the laws of this State and all rules and regulations of the Department of Conservation; such leases shall be executed in duplicate and a copy of the plan of survey shall be annexed thereto; one duplicate shall be delivered to the lessee and the other to be retained by the Department of Conservation and registered in a lease book kept for that purpose.

Said lessee, thereafter, shall enjoy the exclusive use of the water bottoms so leased and of all oysters, shells and cultch grown or placed thereon, subject to the restrictions and regulations herein made.

Lessees, under the supervision of the Department of Conservation, shall stake off and mark the leased water bottoms by such ranges, monuments, stakes, buoys, etc., as may be necessary to accurately locate and fix the limits of the water bottoms embraced in each lease, and shall further cause the area of each leased water bottom, and the name of the lessee, to be shown by signs, as may be determined by the Department of Conservation.

Failure on the part of the lessee to comply with the order of the Department of Conservation to so mark, for identification the bottoms leased by him, them or it, as above set forth in this section, shall subject the lessee to a fine not exceeding One Dollar ($1.00) per acre to be imposed in the discretion of the Department of Conservation.

Section 6. That all leases made under the provisions of this Act shall begin on the day the lease is signed, and shall continue for a period of fifteen (15) years thereafter, under such restrictions as are provided for herein, with the privilege of renewing such lease for a period of not exceeding ten (10) years, subject to and at such valuation as to rental by the Department of Conservation as conditions shall warrant, and in renewing any such lease, the same shall be made subject to the

provisions of this law and any amendments thereto and also subject to any rules and regulations established thereunder by the Department of Conservation, then in force.

The benefits of this Act and the restrictions thereof, shall extend to all leases of oyster bedding grounds heretofore made by the State through the Police Juries, the Oyster Commission, the Board of Commissioners for the Protection of Birds, Game and Fish, the Conservation Commission of Louisiana, and the Department of Conservation of Louisiana, and upon the termination of such original leases, such tenants shall have the right of renewing their leases, under the provisions and restrictions of this Act. The rent shall be paid in advance at the time of the signing of the lease up to the first day of October following, and annually thereafter, in advance, on or before the first day of October of each year, whether the lease be held by the original lessee or by an heir, assignee or transferee.

No person, firm or corporation otherwise authorized to do so by the provisions hereof, shall lease, hold or control more than one thousand (1,000) acres of said water bottoms, except that when said lessee owns or operates more than one canning plant in this State, he, they or it may be permitted to lease an additional five hundred (500) acres of water bottoms and reefs for a second plant, located within this State, an additional three hundred (300) acres for a third plant located within this State and an additional two hundred (200) acres for a fourth plant located within this State; provided, that should said lessee cease to operate any plant, by virtue of the erection or ownership of which he, it or they have been permitted to increase his, its or their lease holding acreage, such cessation shall operate a forefeiture of his, its or their lease upon such acreage as he, it or they may hold by reason of the erection or ownership of such discontinued plant; and any person, firm or corporation which holds or controls, or seeks or attempts to hold or control by partnership or otherwise, more than this amount of water bottoms by any scheme, agreement, understanding or combination whatsoever, shall forfeit, after due trial by a competent Court, the leases held by him, they or it, on any water bottoms of the State.

No license tax, other than those imposed by this Act, shall be levied or imposed by the State or any of its subordinate political corporations or municipalities. Each tenant leasing water bottoms under the provisions of this Act, shall, each year after the commencement of said lease, place under cultivation at least one-tenth of the leased barren water bottoms, and to that end each lessee of water bottoms shall be required to plant thereon sufficient of the raw oyster shells, herein reserved for such purposes, which fact shall be established by the certificate in writing of said lessee attested by two witnesses, to the effect that the requisite amount of oyster shells have been planted on said bedding ground to insure development of the oyster industry in this State, and as required by law, which certificate shall be filed with the Department of Conservation at such time as it may determine.

The Department of Conservation is hereby given the right to make such stipulations in the leases made by it as it shall deem necessary and proper to develop the industry, when not inconsistent with the provisions of this law.

Section 7. That all leases made in conformity with the provisions of this Act shall be heritable and transferable. They shall also be subject to mortgage, pledge or hypothecation and shall be subject to seizure and sale for debt, as any other property rights and credits in this State; this provision shall also apply to all buildings, betterments and improvements thereon. No such inheritance of transfer shall be valid or be of any force or effect whatever, unless evidenced by an authentic act, judgment or proper judicial deed registered in the office of the Department of Conservation in a book provided for that purpose. The Department of Conservation shall keep proper indexes, so that all original leases and all subsequent changes and transfers can be easily and accurately ascertained.

Section 8. That the failure of the tenant to pay the rent punctually on or before the first day of October of each year, or within thirty (30) days thereafter, shall ipso facto, and without demand or putting in default, terminate and cancel

said lease and forfeit to the Department of Conservation of Louisiana, all the works, improvements, betterments and oysters on said leased water bottoms, and the said Department of Conservation is authorized to at once enter on said water bottoms and take possession thereof; thereupon such water bottoms shall be open for lease to the highest bidder and the Department of Conservation, ten days thereafter, shall enter such termination, cancellation and forfeiture on its books and shall give public notice thereof, by publication in one local paper in the Parish where said leased water bottoms are located. The Department of Conservation may waive such termination, cancellation and forefeiture, provided the rent due with ten (10) per cent additional, be paid to it at any time before the said water bottoms are leased to another person, firm or corporation.

Section 9. That from and after the passage of this Act the rentals of all leased water bottoms and natural reefs made in conformity with the provisions of this Act, shall not be less than One Dollar ($1.00) per acre or any fraction of an acre per year, nor more than Five Dollars ($5.00) per acre or fraction of an acre per year, said amount to be determined by the Department of Conservation after the surveyor has reported on same as provided herein.

Section 10. That all vessels engaged in the oyster industry, before beginning operations, must first secure a license from the Department of Conservation of Louisiana, and for that purpose, the owner, captain or agent of said vessel, must present in writing an application setting forth the name and description of said vessel, the name and post office address of the owner and captain, the number of the crew, and such further data as the Department of Conservation shall deem necessary, and thereupon the Department of Conservation may register said vessel and issue the necessary license on payment of the costs thereof, provided that such license shall be issued only upon the application of any resident of this State, any firm or association composed of residents of this State, or any corporation domiciled in, or organized under the laws of this

State and herein otherwise authorized to engage in the oyster industry in this State. All licenses shall be graduated according to the oyster carrying capacity of each boat or vessel, which shall be ascertained under rules and regulations prescribed or to be prescribed by the Department of Conservation, on the basis of twenty (20) barrels to the ton, of carrying capacity and all vessels or boats are required to submit to the necessary survey for this license. A license tax of fifty cents per ton or fraction of a ton for each year is hereby levied on each vessel or boat engaged in the oyster industry in this State when of one (1) ton or more capacity, and a compliance with the provisions of these regulations shall be required of all vessels authorized by the Department of Conservation to engage in the freighting of oysters.

The name of any boat or vessel engaged in the oyster industry shall not be changed without the consent of the Department of Conservation.

These licenses shall always be subject to inspection by the officers of the Department of Conservation, and shall not be good for any other vessel or owner than that for which issued, without the consent of the Department of Conservation written across the face of the license. Licenses shall be issued by the Department of Conservation on license blanks which shall be furnished by it. All vessels engaged in the business of carrying of oysters to the port of New Orleans shall have in their possession, and shall display same upon arrival at said port, a manifest on blank forms, to be furnished by the Department of Conservation, giving all of the details of the cargo which said vessel is carrying on that particular trip.

The license year for licenses shall begin September 1st of one year and end August 31st of the next year.

The license provided by this section, being a license exacted by the State in the control of her own property, and the property of others over which State control is necessary, no parish or municipality shall impose any license on said industry

provided, however, that no license shall be issued to other than persons, firms or corporations owning or operating factories or shucking plants in this State, or dealing in raw oysters in this State. Applicants for license hereunder, otherwise authorized to operate in the oyster industry in this State shall enjoy the right to employ non-resident labor and non-resident vessels, as provided under Section 2 of this Act.

Section 11. That each packer, canner, commission man, dealer, firm or corporation, otherwise authorized under the provisions hereof to engage in the oyster industry, shall keep a record of all oysters purchased by himself or themselves, with the names of the parties from whom purchased, the quantity and the date. They shall also keep an itemized account of all oysters fished by themselves and by all boats controlled by them, and shall exhibit said accounts at all times to the Department of Conservation, or any of its authorized employees. On the first day of each month, each packer, canner, commission man, dealer, firm or corporation, shall make a return under oath to the Department of Conservation as to the number of barrels of oysters purchased and caught during the preceding month, and a severance tax of two and one-half (2½) cents per barrel, on each and every barrel of oysters canned, packed, purchased, caught or gathered from leased water bottoms, and a tax of three (3) cents per barrel, on each and every barrel of oysters canned, packed, purchased, caught or gathered from the natural reefs either for sale or consumption, is hereby levied and shall be paid to, and collected by the said Department of Conservation.

Inspectors of the Department of Conservation are authorized to enter upon any boat, or to enter any building, other than a domicile, where oysters are carried or stored and to inspect such oysters at all times.

In all of the operations of the Department of Conservation, the standard measurement of the barrel referred to herein shall be three and seventy-three hundredths (3.73) cubic feet, which approximately represents the cubic contents of three (3) bushels, or one barrel.

The Department of Conservation shall have the right to examine, inspect and audit the books, papers and memoranda of all persons, firms and corporations engaged in the oyster industry under licenses issued by said Department of Conservation.

All itinerant vendors of oysters at retail, traversing the waters of this State, shall be required, before beginning operations, to secure from the Department of Conservation a written permit so to do, which permit shall provide the place and manner wherein the severance tax on the oysters so fished or purchased for sale or resale, shall be paid to the Department of Conservation. All vessels operated for the purpose of the itinerant sale at retail of oysters as aforesaid, shall have on board the original permit aforesaid, which shall be subject to inspection at any time by any inspector of the Department of Conservation. A failure to obtain and possess such permit, shall authorize, at the option of the Department of Conservation, the condemnation and sale of said vessel and cargo, upon the institution of appropriate legal proceedings, as herein elsewhere provided.

The severance tax herein levied shall be payable to the Department of Conservation, within a period of thirty (30) days from the end of the month, without any penalty. Upon a failure of any person, firm or corporation to pay said severance taxes within said thirty (30) day period, a penalty of ten (10%) per cent per month, calculated upon the severance tax due, shall be levied and collected by the Department of Conservation, in addition to the severance tax, upon all in default in the matter of the payment thereof.

The levy or payment of a severance tax as herein provided shall not be construed as a grant to the person, firm or corporation against whom the same is levied or by whom the same is paid of any right of property or ownership in the shells of said oysters so severed, or the right to transport such oysters in the shell outside of the State of Louisiana.

Section 12. That it shall be unlawful for any person, firm or corporation to fish from the natural reefs of the waters of the State, for the purpose of sale, any oysters, between the first day of May and the 31st day of August, both dates included, of any year. It shall be further unlawful for any person, firm or corporation, between the dates aforesaid, of any year, to fish seed oysters from any natural reefs without previously making application for permission so to do to the Department of Conservation and after having received from said Department a written permit to that effect, which permit shall be issued at the discretion of the Department of Conservation and subject to the requirements of the bedding by such applicants of such quantity of dry oyster shells as cultch as shall be determined by the Department of Conservation. It shall be unlawful for any person, firm or corporation, or any canner, packer or shucker to can, pack or shuck any oysters between the first day of May and the 31st day of August, of any year, both dates included. The foregoing provisions shall not prevent any lessee of oyster bedding grounds, between the dates aforesaid, to cull his own oysters or to use the same for personal home consumption or to sell the same.

Section 13. That no person, firm or corporation shall engage in the business of canning oysters in this State until they shall first have secured from the Department of Conservation an annual license for which a charge of One Hundred Dollars ($100.00) each year is made by said Department of Conservation, for each steam box in use in such establishment. No person, firm, or corporation shall engage in the business of buying for resale, and shipping such oysters, raw or shucked, until they shall first have procured from the Department of Conservation an annual license for which a charge of Twenty-Five Dollars ($25.00), each year, shall be made by said Department of Conservation, when ten or more shuckers shall be employed in such establishment; when less than ten, and more than five shuckers are employed, the license shall be Fifteen Dollars ($15.00), per annum; when five or less shuckers are employed, the license shall be Ten Dollars ($10.00) per annum; and when no shuckers are employed and oysters are handled

in the shell for sale in the State for consumption within the State, the license shall be Ten Dollars ($10.00) per annum, when not more than ten thousand (10,000) barrels of oysters are bought and sold per annum. When more than ten thousand (10,000) barrels of oysters, and less than fifteen thousand (15,000) barrels are caught, bought or sold per annum, the license shall be Fifteen Dollars ($15.00) per annum. When more than fifteen thousand (15,000) barrels and less than twenty thousand (20,000) barrels are caught or bought and sold per annum, the license shall be Twenty Dollars ($20.00) per annum; when more than twenty thousand (20,000) barrels and less than twenty-five thousand (25,000) barrels are caught or bought and sold per annum, the license shall be Twenty-five Dollars ($25.00) per annum. No person, firm or corporation shall begin business without first securing a license. At the end of the year, sworn returns of oysters caught, bought and sold by each licensee shall be made by such licensee who shall pay the additional license shown to be due by him thereby.

Vessels purchasing for resale, oysters to make up a cargo, shall procure a license permitting the conduct of such business, which license shall be graded upon the tonnage of the boat employed and on the following basis, to wit:

Where the tonnage is less than five tons, the license shall be Ten Dollars ($10.00) per annum; where the tonnage is more than five and not exceeding ten tons, the license shall be Fifteen Dollars ($15.00) per annum; where the tonnage exceeds ten tons, the license shall be Twenty Dollars ($20.00) per annum; and every such vessel shall carry on board a suitable book, in which a daily record shall be made of all oysters purchased, giving the date of the purchase, the name of the seller, or vessel from which purchased, and the quantity of oysters purchased, which record shall at all times be open to the inspection of the officials of said Department of Conservation and extracts therefrom shall be furnished the Department of Conservation without cost, whenever required.

The license fees exacted hereunder by the Department of Conservation shall be due on the date fixed by the Department of Conservation, and those operating in the oyster industry shall secure the required licenses in advance. In the event of a failure on the part of any person, firm or corporation to secure the required license, a penalty of ten per cent (10%) of the license shall be charged by the Department of Conservation, for any delay not exceeding thirty (30) days in obtaining said license, a penalty of twenty-five per cent (25%) shall similarly be charged for any delay exceeding thirty days (30) and not exceeding sixty (60) days, and a penalty of fifty per cent (50%) of said license shall be similarly charged for any delay exceeding sixty (60) days, but not exceeding one hundred and twenty (120) days in the obtaining of said license.

In case of any delay exceeding one hundred and twenty (120) days in the obtaining of said license, when it should have been properly obtained, the Department of Conservation is vested with authority to refuse to issue said license for the balance of the season.

Section 14. That it shall be unlawful for any person, firm or corporation to stake off the water bottoms enumerated in this Act, or to bed oysters on said water bottoms without previously leasing same from the Department of Conservation, and after payment of the rental and fees provided herein, except that for emergency purposes in the matter of the preservation of a cargo the oyster fishermen may temporarily bed his cargo on unleased bottoms.

Section 15. That it shall be unlawful for any person, firm or corporation to take or catch oysters from any of the waters of the State, or to have such oysters in possession except under the rules and regulations of the Department of Conservation, and the onus shall be upon the accused to establish that any oysters in his or their possession were lawfully possessed. For the purposes of this Act, all oysters in possession of any person, firm or corporation, in this State, shall be deemed to be oysters fished from the waters of the State.

All oysters taken from the natural reefs of this State shall be culled upon their natural reefs as taken, and all oysters which measure less than three inches (3″) from hinge to mouth, and all dead shells shall be immediately replaced and scattered broadcast upon the natural reefs from which they are taken. No captain or person in charge of any vessel, and no canner, packer, commission man, dealer or other person shall have in his possession off the natural reefs, any natural reef oysters not culled according to the provisions of this Act. Any excess of over five (5) per centum of dead shells and oysters under the size prescribed herein in any cargo or lot of oysters shall be considered a violation of this act, and any officer of the Department of Conservation of Louisiana is authorized to cause to be counted the whole or part of said cargo or lot of oysters at the expense of such person or vessel, to determine said percentage when found necessary; no oysters under one inch in length from hinge to mouth shall be counted, and each half shell of proper size shall be counted as one. All unculled oysters in the possession of any canner, shucker or catcher, shall be presumed to be natural reef oysters and the onus shall be upon the accused to prove that they were fished from a private bedding or planting ground.

Under its supervision and direction the Department of Conservation may permit lessees of oyster bedding grounds to fish for bedding purposes from natural reefs unculled oysters as seed without charge and shall have authority to designate from what natural reefs said oysters may be fished and the quantity to be taken therefrom by any lessee, and therefore this foregoing limitation as to size shall not apply to seed oysters lawfully fished from the natural oyster reefs.

Section 16. That it shall be unlawful to use a dredge, or any means or implement other than hand tongs, in removing oysters from the natural reefs of this State, other than those leased as herein authorized, except that in bodies of water over a depth of eight feet (8′), or where, in the opinion of the Department of Conservation, the body of water regardless of depth, is declared to be too open and exposed to be fished with

hand tongs, the Department of Conservation is authorized to license the use thereon and therein of scrapers and dredges; the applicant for such license shall pay an annual license fee of Twenty-five ($25.00) Dollars for each sailing vessel operated by him, them, or it, using scrapers or dredges; and an annual license fee of Fifty ($50.00) Dollars for each power vessel operated by him, them, or it, using scrapers or dredges; said licenses shall be in addition to other licenses provided for in this Act, and shall be issued upon the express condition that the licensee shall not use said implement on any natural reefs in this State contrary to law. Such license shall be revoked upon any breach of the condition on which the same was issued.

The Department of Conservation, in its discretion, may license the use of dredges or scrapers in bodies of water less than eight feet (8′) in depth, upon the written application of those engaged in the oyster industry in the locality in which such body of water is situated.

The Department of Conservation may suspend the fishing of oysters altogether from any natural reef, or reefs, not leased by it, when such natural reef, or reefs, is, or are threatened with depletion.

Section 17. The lessees of propagating or bedding grounds shall have the right to use on such propagating or bedding grounds any implements or appliances they may desire. The Department of Conservation may require lessees to procure from it permits to use such implements and appliances, such permits to be issued without charge, and to be conditioned that such implements or appliances shall not be used on natural oyster reefs in the State, not leased, contrary to law. No implements or appliances however shall be used in any manner which will impair or destroy any water bottoms held by lessees.

Section 18. That it shall be unlawful for any person or persons, knowingly or wilfully, to take, carry away, or attempt to take or carry away, without the permission of the lessee, any oysters, shells, or cultch from the water bottoms of the Gulf of Mexico or the lakes, bays inlets, lagoons, rivers, bayous, or other waters tributary thereto or connected therewith, within the jurisdiction of the State of Louisiana, which said bottoms are, at the time of such taking, let or leased to any person, firm, or corporation under the laws of Louisiana, for the purpose of bedding, planting, propagating, or cultivating oysters.

It shall be unlawful for any person or persons, knowingly or wilfully to remove, break off, destroy or otherwise injure or alter any stake, monument, bounds, buoys, signs, or any other designation of any bedding or propagating ground placed thereon by the lessee, or to knowingly or wilfully move from any bedding ground any stake, monument, bounds, buoy, sign or mark or other designation placed thereon by the Department of Conservation. No person shall take a cargo or any part of a cargo of oysters in the shell out of the State, or shall fish, catch or gather, a cargo, or any part of a cargo, of such oysters with the intent to take them out of the State into any other State for any purpose.

All owners, and employers, of vessels engaged in the oyster industry in this State shall issue printed instructions to the captains and crews in charge of said vessels calling attention to the provisions of this section, and the same shall be duly executed before a competent notary by the parties interested, the original to be kept by the Department of Conservation and duplicate to be had in possession at all times by the captain of said vessel and shall be shown on demand of any officer or agent of the Department of Conservation. Lack of possession of such document on a vessel, or a refusal to show the same, shall be prima facie evidence that such paper does not exist.

Any one violating any of the provisions of this section shall be liable to the penalties hereinafter provided in this Act, and the imposition of said penalties shall not bar the prosecution and conviction of the wrongdoer under the criminal statutes of this State, now, or hereafter in force, in the event any such violation shall involve the commission of a misdemeanor or crime by such wrong doer.

Section 19. That the Department of Conservation shall give to each licensed vessel or boat a license number and the captain of said vessel shall at once cause such number to be painted on each side of the bow of such vessel or boat, in figures at least six inches high and of proportionate width in a color distinct and different from the body color of the hull; and shall also display said number on the peak of the mainsail of his vessel, and each figure on said mainsail shall be at least sixteen (16) inches high and of proportionate width and shall be six inches apart.

Section 20. That in all disputes as to boundaries between lessess of bedding grounds, the Department of Conservation is vested with full authority to settle the same, and its decision shall be subject to appeal to any court of competent jurisdiction.

Section 21. That the Department of Conservation shall acquire such boats, vessels and other property as may be necessary to regulate and supervise the work of the Department, and shall establish and maintain by means of armed vessels, the necessary patrol of the waters described in Section 1 of this Act with authority to use such arms and force as may be necessary to capture any vessel, or person or persons violating any of the provisions of this Act.

Section 22. That for the purpose of carrying into effect the provisions of this law, and the rules and regulations of the Department of Conservation, the Commissioner, inspectors and other employees of the Department of Conservation, and captains and members of the crews of all vessels in the service of

the Department of Conservation, are hereby constituted peace officers with the right when discharging their duties to carry arms concealed and with the power to arrest on view, without warrant, any one violating the provisions of the law, and it shall be the duty of all captains and crews to lend their assistance and the assistance of their vessels to any employee of the Department of Conservation in making arrests.

Section 23. Vessels, their tackle and apparatus, used in the illegal taking of oysters from the waters of this State shall be seized and taken into possession by the officers and inspectors of the Department of Conservation charged with the enforcement of the conservation laws, and shall be delivered to the Sheriff of the Parish wherein the violation of the law occurred, the Sheriff being authorized to permit of the release of said vessel, or of said vessel and cargo, from seizure upon the owner thereof furnishing bond with good and solvent surety, or sureties, satisfactory to the Judge of the District Court having jurisdiction, in double the value of the vessel, its tackle and apparatus, and cargo if any, seized providing for the return of such vessel, its tackle and apparatus, in good condition to abide the judgment of the Court.

Such vessel shall be liable to forfeiture upon proceedings to that end being instituted in the name of the Department of Conservation by petition in an ordinary suit setting forth the cause of action and praying for the forfeiture of said vessel, its tackle and apparatus, and the Judge of the District Court having jurisdiction shall be authorized to decree the forfeiture of such vessel, with its apparel and apparatus, whereupon said vessel, with its apparel and apparatus, shall be sold at public auction by the Sheriff having jurisdiction, and the proceeds of sale of said vessel, its apparel and apparatus, less the cost of the seizure and of the proceedings, and of the keeping and sale of said vessel shall be paid into the State Treasurer to the credit of the Department of Conservation.

The cargo of the seized vessel, if perishable, shall be sold at once by the Sheriff, or the seizing officer, to the best advantage, and the proceeds of the sale disposed of in the same manner as the proceeds from the sale of seized vessel.

Should the owner of the seized vessel be able to prove to the satisfaction of the Court before which the case is tried that the captain, and crew, of said vessel had agreed in writing to comply with the provisions of Section 18 of this Act in every particular, and that it was not the intention of said owner to permit or allow any infraction of said provisions of the law, then, and in that event, the owner of said vessel shall be held blameless, the vessel released from seizure upon the payment of all costs, and the captain, person, agent, officer, crew or members thereof of said vessel, or by whom, or under whose direction said vessel was used in the illegal taking of said oysters in violation of Section 18 of this Act shall be adjudged guilty of violating the provisions of said section, and shall be sentenced to imprisonment in the parish jail for not less than ninety (90) days, nor more than two (2) years, in the discretion of the Court.

Section 24. That any person, firm or corporation, or common carrier, their agents and officers violating any of the provisions of this Act, where a punishment has not been otherwise provided, shall be guilty of a misdemeanor and shall upon conviction thereof pay all costs of the prosecution, and be fined not less than One Hundred Dollars $(100.00) nor more than Five Thousand Dollars ($5,000.00), or be imprisoned in the parish jail for not less than ninety (90) days, nor more than two (2) years, or both fined and imprisoned at the discretion of the Court, for each offense.

Upon a second conviction of any person, firm or corporation, or common carrier, their agents and officers, for violating any of the provisions of this Act, where a punishment has not been otherwise provided, all licenses issued to such person, firm or corporation, hereunder, shall be forfeited and it shall be the duty of the Judge of the District Court before whom such trial shall be had to declare and order such forfeiture as a part of his sentence.

Section 25. All fines collected under the provisions of this Act, through the courts, shall be paid into the State Treasury for the benefit of the Department of Conservation, for its use in upbuilding the natural reefs of the State, not leased by it hereunder, by planting thereon cultch or oyster shells.

Section 26. The term "Surveyor" as used in this Act shall be taken and construed to be the Survey of the Department of Conservation, who shall be a civil engineer, and a person well informed and experienced in oyster culture. He shall be appointed by the Commissioner of Conservation and have charge of the oyster resources of the State, under the direction of the commissioner of Conservation, who is authorized to fix his compensation.

Section 27. The funds provided for herein and arising from the collection of licenses, the severance taxes, bedding ground rentals, and other sources of income shall be collected by the Department of Conservation, and record made thereof and these funds when so collected shall be deposited in the State Treasury to the credit of the Department of Conservation for the use of said department.

Section 28. To the end that a valuable food product, a natural resource of the State, may be preserved for the benefit of the people of the State of Louisiana, the provisions of this Act shall be broadly construed to conserve this end. In the event that any section or portion of this Act shall be held for any reason to be invalid or unconstitutional, the remaining portions of this Act shall continue in full force and effect.

Section 29. That all laws or parts of laws contrary to or in conflict with the provisions of this Act be and the same are hereby repealed, provided that, in order to permit canning factories located beyond the limits of this State which have heretofore been permitted to take oysters out of the State for canning purposes to adjust their business to the conditions

imposed by this Act, the provisions of this Act, which require all oysters to be shucked or removed from their shells in Louisiana and the oyster shells left in Louisiana, shall not go into effect until after January 1, 1928, as to those oyster canners who shall have obtained from the Department of Conservation of Louisiana permits permitting such canneries until January 1st, 1928, to remove from the State Oysters in the shell for canning in factories located beyond the limits of the State, conditioned upon the right being reserved to the Department of Conservation of Louisiana to revoke any such permit upon the failure to be determined as a matter of fact after hearing by the Department of Conservation of Louisiana, that such permitee or licensee has failed to comply with the conditions imposed in such permit, and the Commissioner of Conservation shall be authorized to issue permits in accordance herewith, which permits shall expire January 1st, 1928.
Approved by the Governor: July 14, 1926.

A true copy:

JAMES J. BAILEY,

Secretary of State.